85-1189

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LONG-AIRDOX COMPANY, DIVISION
OF THE MARMON GROUP, INC.,
Petitioner,

v.

MELVIN KESSLER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

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DATED: January 15, 1986

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state wage payment law which imposes penalties for delay in the payment of benefits is pre-empted by federal labor law where the delay in payment was caused entirely by mandatory negotiations over the timing and amount of such payment between the employer and its employees' union.

2. Whether Section 301 of the Labor Management Relations Act pre-empts a state cause of action for delay in the payment of benefits when the obligation to pay the benefits is wholly derived from a collective bargaining agreement.

3. Whether fringe benefits similar to vacation, holiday or severance benefits paid to employees at the end of their employment pursuant to a collective bargaining agreement constitute a welfare benefits plan or program within the meaning of the Employee Retirement Income Security Act of 1974.

PARTIES

The original parties to the proceedings in the Circuit Court of Fayette County, West Virginia were: Melvin Kessler, Kelly Ross Williams and John Wesley, individually and as class representatives of all others similarily situated (plaintiffs); the Long-Airdox Company, Division of the Marmon Group, Inc.,* Eugene G. Larrick, Jr.,

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* In accordance with Rule 28.1 of the Rules of this Court, please note that there are other divisions and subsidiaries of the Marmon Group, Inc. As of the date of this petition for a writ of certiorari, the other divisions and subsidiaries of the Marmon Group, Inc. are: Accutronics, Aluminum Forge Company, Amarillo Gear Company, American Box Company, American Safety Equipment Corporation, Cerro Conduit Company, Cerro Copper Products Co., Cerro Metal Products, Cerro Sales Corporation, Cerro Wire & Cable Co., Inc., Darling Store Fixtures, Detroit Steel Products, Fenestra Corporation, Fontaine Truck Equipment Company, Hammond Organ Com-

Willis J. Goldsmith, William E. Meador and Russell Gunsaulis (defendants); International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Local 772 of the International Union of United Automobile, Aerospace and Agricultural Implement Workers of America, Herrell H. Jeffers, Edward A. Travis, Clayton C. Castro, Manuel L. Gill, Homer Vest III, Herbert T. Coleman, Jr. and Melvin Kessler (third-party defendants). All individual defendants and all third-party defendants had been dismissed from the suit by the time judgment was entered and did not file a petition for appeal with the West Virginia Supreme Court of Appeals nor an opposition to the petition for appeal that was filed by the Long-Airdox Company.

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pany, Inter-City Suspension Parts, Jamesway Co., Marlok Company, Marmon/Keystone Corporation, Marmon Transmotive, McRobert Springs, Micro-Aire Surgical Instruments, Inc., Midwest Foundry Company, Penn Aluminum International, Perfection Hy-Test Company, The Rockbestos Company, Triangle Auto Spring Company, and Wells Lamont Corporation. Affiliates in which the Marmon Group, Inc. has interests ranging from 19 to 50 percent are: Austins Marmon Ltd., Compania Minera Raura, S.A. (Raura), Explosivos, S.A. (Exsa), Fundicion de Metales Bera del Peru, S.A. (Bera), Indeco Peruana, S.A. (Indeco), Industrias Metalicas Sudamericanas, Ltda. (Imsa), Metalurgica Peruana, S.A. (Mepsa), Reductores de Mexico, S.A. (Remex), Refractarios Peruanos, S.A. (Repsa), and Southern Peru Copper Corporation.

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

Petitioner, the Long-Airdox Company, Division of the Marmon Group, Inc., (hereinafter, "Long-Airdox" or "the Company"), an employer subject to the provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*, and Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Fayette County, West Virginia.

OPINIONS BELOW

The January 2, 1985 opinion of the Fayette County Circuit Court, which directed that final judgment be entered against Long-Airdox, is unreported and is reproduced herein as Appendix A. Reproduced in Appen-

dices B, C, D and E, in reverse chronological order, are the other opinions issued in this case by the Fayette County Circuit Court, all of which are unreported. The opinion which addresses the issues of pre-emption under the NLRA and the LMRA is reproduced in Appendix E. The opinion which addresses the issue of pre-emption under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, is reproduced in Appendix C. The final judgment itself, which was not entered until May 13, 1985, is reproduced in Appendix F. Reproduced in Appendix G is the unreported November 6, 1985 order of the West Virginia Supreme Court of Appeals refusing to hear Long-Airdox's appeal.

JURISDICTION

The judgment of the Fayette County Circuit Court was entered on May 13, 1985. Thereafter, on November 6, 1985, the West Virginia Supreme Court of Appeals refused Long Airdox's petition for appeal. This petition for a writ of certiorari has been filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The constitutional provisions, statutes and regulations involved in this case are as follows: the Supremacy Clause of the Constitution, art. VI, cl. 2; the relevant provisions of the NLRA, 29 U.S.C. §§ 151 *et seq.*, especially Sections 7 and 8 of the NLRA, 29 U.S.C. §§ 157 and 158; Sections 301(a) and 302(c) of the LMRA, 29 U.S.C. §§ 185(a) and 186(c); the relevant provisions of ERISA, especially Sections 3(1) and 514(a) of ERISA, 29 U.S.C. §§ 1002(1) and 1144(a); the relevant provisions of the regulation of the United States Department of Labor entitled "Employee Welfare Benefit Plan," 29 C.F.R. § 2510.3-1; the relevant provisions of the West

Virginia Wage Payment and Collection Act ("Wage Payment Act"), W.Va. Code §§ 21-5-1, *et seq.*, especially W.Va. Code § 21-5-4. These constitutional, statutory and regulatory provisions are reproduced in Appendix H.

STATEMENT OF THE CASE

This Court has long tried to delineate the extent to which state law is pre-empted by federal labor law. The decision below calls into question the viability of state wage payment statutes in the face of an employer's duty to treat exclusively with its employees' union regarding issues unmistakably subject to collective bargaining under federal labor law. In finding that an employer, while engaged in negotiations resulting from a plant shutdown, violated the West Virginia Wage Payment Act by not timely paying certain fringe benefits—benefits which were the subject of such negotiations and which the Company offered to pay, but the Union refused—the decision below both raises new issues and contravenes settled principles regarding pre-emption.

Moreover, the lower court's decision undeniably contravenes this Court's decision last term in *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 105 S.Ct. 1904 (1985), that Section 301 of the LMRA excludes state causes of action for delay in the payment of fringe benefits when entitlement to such benefits is derived from a collective bargaining agreement. Indeed, the decision below went even further and held that even though the cause of action herein was subject to Section 301, nonetheless Section 301 was not the exclusive remedy. Finally, the decision raises the issue of the extent to which state regulation of fringe benefits is pre-empted by ERISA.

The Company maintained a manufacturing facility and warehouse in Oak Hill, West Virginia, where its employees were represented by Local 772 of the International Union of United Automobile, Aerospace and Agri-

cultural Implement Workers of America ("Union").[1] With the expiration of the parties' collective bargaining agreement in April, 1980, the Union went on strike. While negotiations for a new collective bargaining agreement continued, on July 29 the Company announced its decision to close the manufacturing plant, but not its warehouse operations. Following this announcement, the parties reached agreement on a new contract, for the period 1980-83, to govern the remaining warehouse operations. The parties then met on August 5 to negotiate over the effects of the announced plant shutdown.

One of the principal issues in the shutdown negotiations concerned the status of the employees affected by the shutdown and the benefits to be paid—including both the amount and the timing of the payment—to such affected employees. The parties' collective bargaining agreements provided for certain so-called "break time" and "casual day" benefits.[2] Under the parties' practice, if the employees affected by the shutdown were treated as laid off, such benefits would be payable in December and would include any interim increases in cost-of-living pay-

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[1] The factual summary presented in this petition is taken from the affidavits submitted by the Company in opposition to the respondents' motion for partial summary judgment. No testimony was ever taken in this case.

[2] For both break time and casual day benefits, each employee was credited with a certain amount of time depending on his length of service with the Company. The employees could elect to use this credit to take time off work; at the end of the year, employees would receive their regular hourly wages for all unused credits.

At the time of the plant closure, almost all of the employees had some unused break time and casual day credits, but the value of these credits was, on the average, relatively small, with the amounts ranging from around twenty dollars to a few hundred dollars worth of credits. The judgment against the Company requires the Company to pay approximately $500,000 in liquidated damages and interest for its allegedly unlawful delay in the payment of these benefits. *Infra*, p. 8.

ments and wages.[3] If the employees were treated as terminated, they would not enjoy the benefits of these increases, but would be paid immediately.

It was the Union's position at the August 5 negotiations that the employees should be treated as laid off and receive the future increase in benefits. If the Company had agreed to this proposal, it would not have owed the benefits until December. The Company disagreed, however, contending that the employees were terminated and, as early as August 8, the Company prepared a proposed payment schedule itemizing the amounts such employees would receive and presented it to the Union. The Union not only refused to approve these proposed payments, but indeed, throughout the negotiations during the month of August,[4] made no counter-proposal which would have allowed for payment of these benefits by the Company prior to December 1980.

By letter dated September 2, but not received by the Company until on or about September 9, however, the Union finally made a proposal which allowed for immediate payment of the benefits. This was the first time that the Union had proposed anything other than that the Company wait until December before making payments of the benefits. The Union's proposal put to one side the issue of the exact status of the former manufacturing employees and instead proposed that the Company immediately pay employees who were "no longer working" for all unused benefit credits at the rates in effect under the 1977 agreement, with the understanding that the possibility of additional payments, reflecting the

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[3] The 1980-83 contract provided for a $.25 per hour wage increase. Moreover, there were two quarterly cost-of-living increases due between August and December. In 1980, these cost-of-living increases were substantial.

[4] The parties held one more plenary session on August 14. In addition, there were several informal discussions between Company representatives and the Union's president.

difference between the 1977 and 1980 contract rates and any cost-of-living adjustments, would be the subject of future negotiations. By letter dated September 10, the Company agreed to this proposal. Checks issued in accordance with the schedule that the Company had presented to the Union over a month earlier—on August 8—were made available for distribution to employees on September 10.

The Company and the Union continued to bargain after September 1980 about the effects of the closure of the manufacturing facility, with the final result that employees affected by the closure were granted some, but not all, of the rights afforded to laid-off employees. In other words, the employees were granted something of a "hybrid" status, allowing them to accrue certain pension benefits and recall rights. The subject of additional pay for fringe benefit credits was not raised by the Union in any negotiation session after September 10, 1980.

While the Company and the Union negotiated about the payment of the fringe benefit credits during August and September, no attempt was made by the employees or the Union to use the grievance and arbitration procedure available to them for resolving contractual disputes.[5]

Instead on September 25, 1980, two weeks after the benefits had been paid, the Company was named as a defendant in a class action brought by its manufacturing employees under the West Virginia Wage Payment Act.[6] The plaintiffs (respondents herein) alleged that the Company had violated the Wage Payment Act by failing to pay them the value of their fringe benefit credits by August 7, 1980, which was the next regular payday following the closure of the manufacturing facility.

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[5] The 1980-83 contract was in effect by August 5, so there is no question the employees and the Union had the right to invoke the grievance and arbitration procedure.

[6] Individual defendants were also named, but the Fayette County Circuit Court ultimately dismissed the individual defendants from the lawsuit.

The Company moved to dismiss the complaint on the grounds that the employees' claim was pre-empted by federal law, specifically Sections 7 and 8 of the NLRA and Section 301 of the LMRA. More particularly, the Company contended that since it was in negotiations with the Union as to the payment of these benefits, it could not, without running afoul of the NLRA, have paid these benefits without the agreement of the Union. Moreover, since the Company and the Union differed as to the interpretation of the parties' agreement and since the claim for payment was predicated upon the collective bargaining agreement, any dispute over payment was governed by Section 301 and should have been resolved through the grievance and arbitration procedure.

On May 27, 1982, however, the Fayette County Circuit Court denied the Company's motion to dismiss, concluding that respondents' cause of action was not pre-empted (App. E at 15a):

> I am unable to find any specific language in federal statutes expressing the intent of congress to pre-empt the right of state courts to act under state laws concerning the rights of employees to be promptly paid full wages for services rendered. The question of payment of wages has been an area of traditional concern to state governments and both statutory and common law remedies are prevalent throughout the various states. This was no doubt known to congress and if they had intended exclusive jurisdiction for the National Labor Relations Board, various administrative federal agencies and federal courts they surely would have included some express language to that effect. Their failure to do so therefore raises the strong implication that no such intent existed.

In the court's view, the state statute was not pre-empted because even though the benefits were derived from the collective bargaining agreement, "the applicable state statute intended to create rights for individual employees and not for a bargaining unit as such." (App. E at 17a).

Finally, although acknowledging that a Section 301 cause of action existed for the claimed delay in payment, the court nonetheless held:

> It appears that plaintiffs, or their bargaining agent (union) probably do have a remedy under Section 301 of the LMRA. Neither expressly or impliedly however is there any indication that it is the exclusive remedy or that it preempts available state remedies.

(App. E at 18a).

This decision was followed on July 1, 1983 by an opinion concluding that the Company had violated the Wage Payment Act, but reserving for further consideration the question of what damages respondents were entitled to receive (App. D). In this opinion, the court reiterated its view that the Wage Payment Act was not pre-empted by the NLRA because it creates "individual rights of individual employees and imposes an absolute duty upon the employer to make that payment . . . irrespective of any agreement or waiver" (App. D at 12a).

The Company then moved for reconsideration of the court's decision regarding its purported violation of the Wage Payment Act. That motion for reconsideration not only asked the court to consider once again the issues of pre-emption under the NLRA and the LMRA, but also raised the issue of pre-emption under ERISA. By its opinion of November 10, 1983 (App. C), the court denied this motion for reconsideration. On the ERISA pre-emption issue, the court concluded that the benefits in question were not benefits due under an "employee welfare benefit plan", as defined in the statute. 29 U.S.C. § 1002(1).

Thereafter, on May 13, 1985 the court entered a judgment in this case awarding respondents approximately $500,000 in liquidated damages and interest (App. F),

a result which the court itself found to be "very harsh," but nonetheless compelled by the statute.[7]

Subsequently, Long-Airdox filed a petition for appeal with the West Virginia Supreme Court of Appeals, in which it argued that the respondents' cause of action was pre-empted under the NLRA, the LRMA and ERISA. On November 6, 1985, the West Virginia Supreme Court of Appeals denied the Company's petition, declining to review the judgment of the Fayette County Circuit Court.

I. THE DECISION OF THE COURT BELOW IGNORED, AND IS IN DIRECT CONFLICT WITH, THE SUPREMACY CLAUSE OF THE CONSTITUTION AND DECISIONS OF THIS COURT

A. Pre-emption Under The NLRA

State laws which interfere with conduct that is protected by Section 7 of the NLRA are pre-empted by operation of the Constitution's Supremacy Clause. Art. VI, cl. 2. This Court has repeatedly held that even where conduct is only arguably protected by Section 7, state laws which impede or frustrate that conduct must yield. *E.g.*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

Although conduct which is arguably protected is only presumptively pre-empted, subject to rebuttal by a showing that the regulated activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests . . . deeply rooted in local feeling and responsibility," *id.* at 243-44, state laws which interfere with conduct which is actually protected are conclusively pre-empted. "If the state law regulates conduct

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[7] Thus, in its decision on January 2, 1985, the court held, "It appears that the punitive effect of the West Virginia statute can be quite harsh and, in fact, is very harsh in this particular case." (App. A at 3a).

that is actually protected by federal law . . . pre-emption follows . . . as a matter of substantive right." *Brown v. Hotel & Restaurant Employees*, —— U.S. ——, 104 S.Ct. 3179, 3187 (1984). The West Virginia Wage Payment Act, as applied by the lower court, directly interfered with the employees' right to bargain collectively and the Company's correlative duty to bargain exclusively with its employees' designated representative and is, therefore, conclusively pre-empted.

The right of employees to bargain collectively is unquestionably one of the rights protected by Section 7 of the NLRA, and indeed constitutes the cornerstone of federal labor policy. "Central to achievement" of the NLRA's purposes "is the promotion of collective bargaining." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1981). If employees have exercised their right to bargain collectively, an employer has an explicit statutory duty to bargain with the employees' designated representative over "wages, hours, and other terms and conditions of employment." 29 U.S.C. § 158(d). In accordance with this Court's interpretation of this statutory mandate, there is "no doubt" that an employer is "under a duty to bargain about the results or effects of its decision" to cease operations. *First National Maintenance*, 452 U.S. at 677 n.15.

Moreover, the Company's duty to bargain with the Union ruled out any attempt to resolve the benefits dispute by dealing with the employees on an individual basis. As this Court said in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 44-45 (1937), "the obligation to treat with the true representative [is] exclusive and hence impose[s] the negative duty to treat with no other." The NLRA provides that "representatives . . . selected for the purpose of collective bargaining . . . shall be *exclusive* representatives of all employees in such units for the purposes of collective bargaining." 29 U.S.C. § 159(a) (emphasis added). Failure to bargain with the

employees' exclusive representative constitutes an unfair labor practice. 29 U.S.C. § 158(a)(5); *see J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

In the instant case, the Company is being penalized under the West Virginia Wage Payment Act for meeting its obligations under federal law. Long-Airdox complied with its statutory duty by bargaining with its employees' designated representative over the effects of its plant closure. Among the issues discussed during these negotiations was the payment of fringe benefits. Respondents' Union insisted that payment be made in December, 1980, at the contract rate that would then be in effect. Because of the insistence of respondents' Union on this point, Long-Airdox had no choice but to continue bargaining over this issue until such time as an agreement on payment or an impasse in the negotiations was reached.

Payment of the benefits to the employees, while the Company and Union were in negotiations, would have undercut the Union's status as exclusive bargaining representative and violated the NLRA. *NLRB v. Katz*, 369 U.S. 736, 743-44 (1962). That some of the employees might have preferred to be paid immediately, even if it meant receiving less than they would in December, makes no difference. In *Katz*, the employer implemented a sick-leave plan that some of the employees might have regarded as an improvement. *Id.* Nonetheless, this Court unequivocally stated that the employer's granting the benefit "plainly frustrated the statutory objective of establishing working conditions through bargaining." *Id.* Such action undercut the Union's bargaining authority and "inhibit[ed] the useful discussion contemplated by Congress in imposing the specific obligation to bargain collectively." *Id.* If the Company had complied with the Wage Payment Act, as applied by the lower court, it would similarly have violated its duty to treat with the

Union as its employees' exclusive bargaining representative.[8]

In holding that the Wage Payment Act required Long-Airdox to pay the fringe benefits by the next regular payday following the plant closure, the lower court placed Long-Airdox in the untenable position of choosing between compliance with its obligations under state law and its obligations under federal law. The lower court did not recognize this dilemma, because, in the face of the contrary mandate of the NLRA, it concluded that Long-Airdox should have dealt with the employees as individuals and not bargained with their collective representative. As the court stated in its decision on the respondents' motion for partial summary judgment:

> The defendant seeks to justify its failure to pay wages within the time prescribed by statute upon its inability to agree with the [Union] as to the amount of benefits and whether the benefits were payable under the wage scale of the old contract or the new one. This position is not valid for the reason that the applicable statute creates individual rights of individual employees and imposes an absolute duty upon the employer to make that payment. This is so irrespective of any agreement or waiver which might be executed by the employee or any other person.

(App. D at 12a.)

Of course, this conclusion is in direct conflict with law long settled by this Court. *See, e.g., J.I. Case, supra,* 321 U.S. at 338 ("The very purpose of providing by

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[8] The court below completely failed to understand that immediate payment of the disputed benefits without the Union's agreement would have resulted in a violation of the NLRA. In concluding that the respondents' cause of action was not pre-empted, the Fayette County Circuit Court speculated that Long-Airdox "certainly would not have been in violation of the provisions of the NLRA" had it made immediate payment of benefits at the 1977-80 contract rate (App. E at 17a).

statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group.")

Because the lower court's decision erroneously upholds local interference with employees' bargaining rights and employers' bargaining duties under the NLRA, it is in direct conflict with this Court's decision in *Teamsters v. Oliver*, 358 U.S. 283 (1959). In that case, this Court held that an Ohio antitrust law, which was utilized in a suit to enjoin some motor carriers from adhering to the economic provisions of a collective bargaining agreement between the carriers and their drivers' unions, was pre-empted to the extent that it interfered with the parties' bargaining rights and obligations. This Court reasoned that the law was pre-empted because the law's "application would frustrate the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving." *Id.* at 296. The Court emphasized that the "employers were under a duty to bargain collectively with the Union as to the subject matter [at issue]." *Id.* at 295. Because the state law interfered with this bargaining duty of the carriers its application "would wholly defeat the full realization of the congressional purpose" of promoting collective bargaining. *Id.* at 295-96.

That frustration of the federal policy of promoting collective bargaining is equally apparent in this case. Wages and benefits are indisputably subjects of mandatory bargaining under federal law, as is the question of how payment of those benefits should be structured in the event of plant closure. *First National Maintenance, supra*, 452 U.S. at 677 n.15. Therefore, the Company was under a duty to bargain with the Union over the time and amount of payment, yet the Wage Payment Act required the Company to make payment in complete disregard of the Union's proposals. Application of the Wage

Payment Act "frustrate[d] the parties' solution of a problem which Congress has required them to negotiate in good faith toward solving." *Teamsters v. Oliver*, 358 U.S. at 296.

One of the ironies of the decisions of the Fayette County Circuit Court in the instant litigation is that it did recognize the primacy of federal labor law—as far as the Union was concerned. Thus, when the Company attempted to bring in the Union and various officers and other individuals associated with the Union as third-party defendants, the Court concluded that the Company's third-party complaint had to be dismissed as it represented "an attempt to impose liability for conduct which is specifically protected under applicable federal statutes" (App. B at 5a). The court thus upheld the primacy of federal labor law with respect to the Union, but not with respect to the Company.[9]

It is important to recognize that the problems caused by applying wage payment statutes in such a way that they interfere with federally-mandated negotiations are not merely academic. In recent years there has been an increase in the number of plant closures. *See* 131 Cong. Rec. H 9998 (daily ed. Nov, 12, 1985) (Remarks of Rep. Martinez regarding congressional study of plant closures). The inability of employers and unions to negotiate over

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[9] As a further illustration of the lower court's failure to understand the issues presented by this case, the court below mistakenly analyzed the NLRA pre-emption issue as one involving a mere presumption of pre-emption, as revealed by its observation that "[t]he question of payment of wages has been an area of traditional concern to state governments." (App. E at 15a). *Cf. San Diego Building Trades Council v. Garmon*, 359 U.S. at 244. In the instant case, where "the issue is one of an asserted substantive conflict with a federal enactment, then '[t]he relative importance to the State of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.'" *Brown v. Hotel & Restaurant Employees*, 104 S. Ct. at 3187 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

payment of benefits may spell the difference between keeping a plant in operation and leaving the employees jobless. Thus, in the interests of the group, unions could negotiate a postponement in the payment of benefits, or even a reduction in the amount of benefits due and owing, in exchange for keeping the facility open. But application of the state wage payment law "would frustrate the parties' solution of [this] problem which Congress has required them to negotiate in good faith toward solving." *Teamsters v. Oliver*, 358 U.S. at 296.[10]

The significance of the lower court's decision that state wage payment laws can compel an employer to forego bargaining with its employees' collective bargaining representative is apparent given that virtually every state in the country has a statute governing the payment of wages to employees who are no longer working, including the time of payment.[11] If these statutes are ap-

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[10] Other examples of obstruction of negotiated solutions to employer-employee difficulties readily come to mind. Thus, if state wage payment laws compel payment by a certain date, an employer on the verge of declaring bankruptcy could not negotiate for a delay in the payment of benefits which would allow it to pay its employees the full value of their benefits, albeit at a later date. In addition, employees affected by a plant closure at the end of the year could not negotiate for a deferral of payment until after the new year, thereby avoiding higher taxes in the likely event that their income will be lower in the new year.

[11] Alaska Stat. §§ 23.05.140, 23.05.170; Ariz. Rev. Stat. Ann. § 23-353; Cal. Lab. Code §§ 201-203; Colo. Rev. Stat. §§ 8-4-104, 8-4-108; Conn. Gen. Stat. Ann. § 31-71; Del. Code Ann. tit. 19, § 1103; D.C. Code Ann. § 36-603; Hawaii Rev. Stat. § 388-3; Idaho Code § 45-606; Ill. Rev. Stat. ch. 48, §§ 39m-4, 39m-5; Ind. Code §§ 22-2-5-1, 22-2-9-2; Iowa Code Ann. § 91A.4; Kan. Stat. Ann. § 44-315; Ky. Rev. Stat. § 337.055; La. Stat. Ann. § 23:631; Me. Rev. Stat. Ann. tit. 26, § 626; Md. Ann. Code art. 100, § 94; Mass. Ann. Laws ch. 149, § 148; Mich. Comp. Laws Ann. § 408.475; Minn. Stat. Ann. §§ 181.13, 181.14; Mo. Ann. Stat. 290.110; Mont. Code Ann. § 39-3-205; Neb. Rev. Stat. § 48-1230; Nev. Rev. Stat. §§ 608.020, 608.030;

plied as the West Virginia Wage Payment Act was applied in the instant case, employers will be compelled to choose between complying with their bargaining obligations under the NLRA and paying the benefits pursuant to the timetable established by state statute.

In the instant case the lower court decided to apply the state wage payment statute, despite the obvious conflict with federal law. Because the decision of the lower court is directly contrary to controlling authority, and because the prevalence of similar wage payment statutes makes its decisions especially significant, this Court should grant this petition in order to correct the erroneous conclusions of the lower court and to resolve the extent to which state wage payment laws are pre-empted by federal labor law.

B. Pre-emption Under Section 301 Of The LMRA

Section 301 of the LMRA governs the interpretation and enforcement of rights created by a collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 105 S.Ct. 1904 (1985); *Smith v. Evening News Association*, 371 U.S. 195 (1962). Thus, courts deciding cases which involve interpretation of the rights created by a collective bargaining agreement must apply federal substantive law, derived from national labor policy. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). State law may be resorted to only if it is compatible with the purposes of Section 301. *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962).

N.H. Rev. Stat. Ann. § 275:44; N.J. Stat. Ann. § 34:11-43; N.M. Stat. Ann. §§ 50-4-4, 50-4-5; N.Y. Lab. Law § 191; N.C. Gen. Stat. § 95-25.7; N.D. Cent. Code § 34-14-03; Okla. Stat. tit. 40, § 165; Or. Rev. Stat. § 652.140; Pa. Stat. Ann. tit. 43, § 260.5; R.I. Gen. Laws § 28-14-4; S.C. Code Ann. § 41-11-170; S.D. Codified Laws Ann. §§ 60-11-10, 60-11-11; Tex. Stat. Ann. art. 5156; Utah Code Ann. § 34-28-5; Vt. Stat. Ann. tit. 21, § 342; Va. Code § 40.1-29; Wash. Rev. Code § 49.48.010; W.Va. Code § 21-5-4; Wis. Stat. Ann. § 109.03; Wyo. Stat. §§ 27-4-101, 27-4-104.

Contrary to the decision below, this policy of federal pre-emption of state laws by Section 301 does not vary merely because the contested issues involve individual employees' contract rights. Indeed, this Court has only recently reaffirmed the principle of pre-emption by Section 301 in a case identical to the instant one, in which an employee contended that his employer had unlawfully delayed payment of disability benefits. *Allis-Chalmers Corp. v. Lueck*, *supra*.[12] Even though that case involved the rights of an individual employee, and not the employee's union, the Court concluded that Section 301 governed the employee's claim since his claim to the fringe benefits was predicated upon the collective bargaining agreement. This Court unequivocally stated that "it is a question of federal contract interpretation whether there is an obligation under this labor contract to provide the payments in a timely manner." 105 S.Ct. at 1913. So too in the instant case, the question of the timeliness of Long-Airdox's benefit payments must be governed by Section 301 because the benefits were entirely a creature of contract.

In addition to furthering the important policy of uniform interpretation of federal labor laws, Section 301 has also been interpreted to promote another important national policy, namely the peaceful and expeditious resolution of labor disputes through the use of grievance and arbitration procedures. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-53 (1965). Most collective bargaining agreements, such as the one at issue here, contain grievance and arbitration procedures which may be invoked by the employees in order to pursue any claims they might have arising out of the contract. This Court has

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[12] The decision in *Allis-Chalmers* was rendered after the court below had resolved the pre-emption issues against the Company, but before entry of final judgment. The Company moved for reconsideration on the basis of *Allis-Chalmers*, but this motion was denied without opinion.

decided that such procedures must be exhausted before an employee institutes a court action under Section 301 based on those contract claims. Exhaustion is required because "Congress has expressly approved contract grievance procedures as a preferred method for settling disputes." *Id.* at 653 (citing 29 U.S.C. § 173(d)).

This exhaustion principle was similarly reaffirmed by the recent *Allis-Chalmers* decision. In concluding that the employee in that case was obliged to exhaust his contractual remedies before filing suit over the allegedly unlawful delay in the payment of his benefits, the Court observed that "[a] rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness . . . as well as to eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance." 105 S.Ct. at 1916.

The Fayette County Circuit Court blatantly ignored both of these important national policies in refusing to dismiss the respondents' complaint. In its decision, the court concluded that the respondents' action was not preempted by Section 301 of the LMRA because "the applicable state statute [*i.e.*, the Wage Payment Act] intended to create rights for individual employees and not for a bargaining unit as such" (App. E at 17a). Incredibly, the court reached this conclusion even though it conceded "that plaintiffs, or their bargaining agent (union) probably do have a remedy under Section 301 of the LMRA" (App. E at 18a).

Needless to say, this conclusion that Section 301 is not exclusive of state law causes of action is directly contrary to the decisions of this Court holding that Section 301 claims cannot be brought under state law. "[I]ssues raised in suits of a kind covered by § 301 [must] be decided according to the precepts of federal labor policy"

and states are not "free to apply individualized local rules" in adjudicating Section 301 claims. *Local 174, Teamsters v. Lucas Flour Co., supra*, 369 U.S. at 103.[13] Moreover, the court below also erroneously concluded in the face of its observation that the respondents had a Section 301 remedy, that the respondents were not required to exhaust their contractual grievance and arbitration procedures before bringing suit.

The circuit court's mistaken conclusion that Section 301 of the LMRA does not pre-empt the respondents' cause of action can be traced to its clearly erroneous assumption that Section 301 only deals with a union's rights under a contract, as opposed to the rights of individual employees such as the plaintiffs. To the contrary, as already indicated, this Court has clearly established that the touchstone for determining whether a state action is pre-empted by Section 301 is *not* whether the rights of individual employees or unions are at stake but rather whether "resolution of [the] state law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers, supra*, 105 S.Ct. at 1916. Thus, in *Allis-Chalmers*, the fact that the suit was brought by an individual employee who alleged that the employer had violated state law by its bad-faith handling of his personal claim for benefits did not remove the suit from the purview of Section 301. That suit was governed by Section 301, as is the instant one, because the individual employee's claim required an interpretation of the collective bargaining agreement's provisions dealing with the payment of benefits.

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[13] It is important to recognize that this is not a case in which an employer and a union are contending that they can agree to waive employee rights to certain minimum wage or safety standards required by state or federal law. *Cf. Allis-Chalmers, supra*, 105 S.Ct. at 1911-12. The employees' entitlement to these benefits was wholly derived from the contract.

Moreover, Section 301 governed even though the employee styled his action as a state law tort claim, rather than a contract claim. As this Court stated, "questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether [or not] such questions arise in the context of a suit for breach of contract." *Id.* at 1911. The Court further observed that "[a]ny other result would elevate form over substance and allow parties to evade the requirements of § 301 by re-labeling their contract claims." *Id.* The Court expressly added that claims involving an individual employee's entitlement to fringe benefits and wages set forth in the contract are governed by Section 301, stating that "[c]laims involving vacation or overtime pay . . . [are] traditionally resolved through arbitration." *Id.* at 1915. *Accord, Republic Steel v. Maddox, supra,* 379 U.S. at 657 (severance pay claim of individual employee should have been grieved and employee's failure to file grievance requires dismissal of his state court action).

The fact that the individual employees in the instant case styled their claim as a statutory cause of action cannot, therefore, obscure the fact that any statutory rights they might have had were completely dependent on their contract rights.

The lower court's failure to understand this point accounts for its mistaken reliance on this Court's decision in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981) (App. E at 16a). *Barrentine*, which involved a claim for minimum wages under the federal Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, held that individual employees had a statutory right to wages and benefits specified in the FLSA and therefore were not bound to rely solely on any contractual grievance procedures that were available to them for resolving their claim for minimum wages. *Barrentine*,

however, is completely inapposite because in the instant case any right the respondents had to the payment of the disputed fringe benefits derived entirely from the collective bargaining agreements. Only by interpreting those agreements could it be determined whether the disputed fringe benefits were a form of deferred compensation the payment of which could be delayed until December. *See, e.g., Viggiano v. Shenango China Division*, 750 F.2d 276, 281 (3d Cir. 1984) (distinguishing *Barrentine* on the grounds that the entitlement to benefits at issue in *Barrentine* derived from the FLSA rather than a collective bargaining agreement); *Delaney v. Union Carbide Corp.*, 749 F.2d 17, 19 (8th Cir. 1984) ("key distinction between the present case and cases like *Barrentine* . . . is that here the rights that plaintiff seeks to enforce are wholly created by contract").

Because the unforeseen issues surrounding the date and rate of payment of the fringe benefits were questions of contract interpretation, any quarrel over Long-Airdox's handling of these issues should have been referred to a neutral arbitrator, as provided in the collective bargaining agreements between Long-Airdox and the Union. "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

That there was no explicit provision in the contracts specifying the status and rights of employees affected by a plant closure, nor even an understanding between Long-Airdox and the Union as to which collective bargaining agreement applied, did not make the payment of these benefits any less of a contractual issue. As this Court has pointed out, a "labor arbitrator's source of law is not confined to the express provisions of the contract." *Id.* A collective bargaining agreement "is more than a contract;

it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* at 578. Issues relating to the applicability of an agreement and entitlement to benefits in the event of a plant closure are grist in the arbitrator's mill. *E.g., Marshalltown Instruments, Inc.*, 85-2 Lab. Arb. Awards (CCH) ¶ 8619 (1985) (Thornell, Arb.) (arbitrator determines whether employees are laid off or terminated as result of plant closure and whether employees are entitled to vacation benefits); *Kohl's Food Stores*, 85-2 Lab. Arb. Awards (CCH) ¶ 8439 (1984) (Flaten, Arb.) (arbitrator determines which of two collective bargaining agreements applies and employees' entitlement to severance pay benefits); *Cook United, Inc.*, 83-1 Lab. Arb. Awards (CCH) ¶ 8134 (1983) (Murphy, Arb.) (arbitrator concludes employees terminated as a result of plant closure entitled to payment of vacation benefits, but not health and welfare benefits).

The attempt of the individual employees to circumvent the grievance and arbitration process by bringing a suit in state court not only deprived Long-Airdox of the benefit of its bargain, but also needlessly delayed the ultimate resolution of these issues. Indeed, the lengthy delay that has resulted from the employees' state court suit illustrates one reason why federal labor policy so strongly favors arbitration. Instead of the prompt resolution of the fringe benefit issues through arbitration, both the employees and the Company have been burdened with a prolonged court proceeding, in which final judgment was entered nearly five years after the dispute arose. "[T]he very purpose of arbitration procedures is to provide a mechanism for the expeditious settlement of industrial disputes." *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 249 (1970). That purpose was frustrated in the instant case when the employees bypassed the grievance and arbitration procedure.

In short, the lower court's decision is wholly at odds with settled law under Section 301 and this Court's recent decision in *Allis-Chalmers*. The lower court's decision must be reversed as it undermines the vitality of that decision and the role of arbitration as the primary means of dispute resolution under federal labor law.

II. THE DECISION BELOW RAISES AN IMPORTANT QUESTION, WHICH THE FEDERAL COURTS OF APPEALS HAVE NOT RESOLVED, REGARDING THE DEFINITION OF A WELFARE BENEFITS PLAN OR PROGRAM COVERED BY ERISA

As this Court recognized in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983), ERISA contains a sweeping pre-emption clause which is designed to displace all state regulation of employee benefits. Section 514(a) of ERISA, 29 U.S.C. § 1144(a), states, in relevant part, that "the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title and not exempt under Section 1003(b)."

The respondents' cause of action was pre-empted by ERISA, therefore, as long as the benefits at issue here were provided as a result of an "employee welfare benefit plan" as that term is defined in ERISA. Section 3(1) of ERISA, 29 U.S.C. § 1002(1), defines "employee welfare plan" as:

> [A]ny *plan*, fund, or *program* which was heretofore or is hereafter *established or maintained by an employer or by an employee organization or by both*, to the extent that such *plan*, fund, or *program* was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability,

> death or unemployment, or vacation benefits . . . or (B) any benefit described in section 186(c).

(Emphasis added.)

ERISA's cross-reference to 29 U.S.C. § 186(c), Section 302(c) of the LMRA, indicates that "vacation, holiday, severance or similar benefits" are also welfare benefits.

Contrary to the lower court's decision, ERISA's definition of "employee welfare benefit plan" thus makes no distinction between plans or programs whose benefits are distributed from a trust and plans or programs whose benefits are paid directly from an employer's general assets. Similarly, the definition does not indicate that a plan or program must meet ERISA's reporting and filing requirements—with respect to annual reports, plan descriptions, etc.—in order to be considered an "employee welfare benefit plan." Although ERISA lists various requirements that a benefits plan is to adhere to, *see, e.g.*, 29 U.S.C. §§ 1021-24, these requirements do not form part of the definition of "employee welfare benefit plan." The payment of the benefits at issue from the Company's general assets and the Company's failure to comply with ERISA's reporting and filing requirements do not, therefore, place the benefits paid in this case outside of the scope of ERISA. *E.g., Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503-04 (9th Cir. 1985).

Accordingly, the lower court was clearly mistaken when it rejected the applicability of ERISA on the grounds that there was no "indication that Long-Airdox has ever created a plan description, filed annual reports or other information required by ERISA" (App. C at 9a). The collective bargaining agreement suffices as a plan, as indeed the Company's bare promise to pay may well have sufficed as long as the promise defined plan participants and established procedures for payment. *Scott, supra*, 754 F.2d at 1503-04.

The court below also concluded that the respondents' cause of action was not pre-empted by ERISA because the benefits in dispute, principally so-called break time and casual day benefits, were not welfare benefits (App. C at 8a). This is far too narrow a reading of the statute, since, as indicated, welfare benefits include vacation benefits, holiday benefits, severance benefits and "similar benefits". The break time and casual day benefits are unquestionably at least "similar" to vacation, holiday and severance benefits. Indeed, the provisions dealing with break time and casual day benefits in the parties' collective bargaining agreements were found under the article entitled "Vacations," the benefits provided employees with days off, or holidays, of their own choosing and, as with severance benefits, these benefits were paid to the employees after the plant closure.

Nonetheless, recent decisions by the federal courts of appeals have indicated that these courts are having as much difficulty as the Fayette County Circuit Court in applying ERISA's definition of "welfare benefit plan" and are reaching differing conclusions regarding ERISA pre-emption depending on the type of benefit they conclude is at issue. *Compare Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985) and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985) (severance benefits paid out of general assets pursuant to employer's policy manual constitute welfare benefits plan) *with California Hospital Ass'n v. Henning*, 770 F.2d 856 (9th Cir. 1985) (vacation benefits paid out of general assets pursuant to employers' policy do not constitute welfare benefits plan).

Part of the difficulty that the lower courts are having in applying ERISA's definition of welfare benefit plan is the result of a regulation of the U.S. Labor Department which distinguishes between so-called "payroll practices" and benefit plans or programs covered by ERISA by stating that benefit plans which involve payment out of an

employer's general assets are "payroll practices" not covered by ERISA, at least when the benefits provide sick-leave compensation or compensation "while an employee is on vacation or absent on a holiday." 29 C.F.R. § 2510.3-1(b). This regulation thus draws a distinction between funded and unfunded benefit plans and a distinction between sick-leave, vacation and holiday benefits and other types of benefits. Neither distinction finds support in the statute itself.

The confusion surrounding the criteria to be applied in determining what constitutes an "employee welfare benefit plan" has a significantly adverse impact on both employers and employees. There are scarcely any employers which do not provide some form of fringe benefits which at least arguably fall under ERISA's definition of "welfare benefits." Confusion over whether employers and employees are to look to a uniform federal law in resolving disputes over payment or whether, contrary to the original intent of ERISA, they are consigned to a crazy-quilt pattern of conflicting state laws obviously bears on an employer's ability to comply with the applicable law. As in the instant case, such confusion can result in the imposition of substantial penalties for non-compliance. The assistance of this Court is, therefore, urgently needed to resolve this important question of statutory construction.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinions of the Fayette County Circuit Court.

Respectfully submitted,

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DATED: January 15, 1986

APPENDICES

APPENDIX A

[SEAL]

TWELFTH JUDICIAL CIRCUIT
OF WEST VIRGINIA
FAYETTE COUNTY
J. ZANE SUMMERFIELD, JUDGE
FAYETTEVILLE, WEST VIRGINIA 25840

TELEPHONE
(304) 574-2250

January 2, 1985

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Dear Sirs:

Re: Melvin Kessler, et als

Vs: CA 80-C-883
Long-Airdox Company,
a corporation

The court has now carefully considered the matter of damages to be awarded to individual plaintiffs in this civil action. An order was entered granting partial summary judgment on the issue of liability in an earlier opinion. Since that time the parties have stipulated the wage rates of the individual plaintiffs, which wage rates are reflected in an appendix attached to this letter and made a part hereof.

Upon the plaintiffs' motion for final summary judgment on the issue of liquidated damages under the West

Virginia Wage Payment and Collection Act, West Virginia Code Section 21-5-1, et seq., and particularly Section 21-5-4 (e), the court is of the opinion to and does hereby render judgment for each of the individual plaintiffs listed in the appendix attached hereto and for the amounts shown in said appendix.

The facts are undisputed that wages were due and owing to the individual plaintiffs on or before August 7, 1980, and were not paid until on or after September 9, 1980, a period in excess of thirty days. The court hereby finds that each plaintiff is, therefore, entitled to thirty day's pay as and for liquidated damages at his respective wage rate.

In reaching the conclusion that individual plaintiffs are entitled to recover a full thirty days' wages, the court has relied heavily upon the case of *Griffin* v. *Oceanic Contractors, Inc.*, 102 S. Ct. 3245 (1982). In that case, Justice Rehnquist held that the District Court lacked discretion to limit the period for which the wage penalty was assessed, stating that the imposition of such penalty is mandatory for each day that payment is withheld in violation of the Federal statute. The Federal statute, which is in many ways similar to our State statute, was declared to be remedial, although congress had chosen to apply potentially punitive sanctions designed to deter negligent or arbitrary delays in payment.

It is clear that our state legislature carefully chose the language of our statute and intended it to mean exactly what its plain language says. There is no hint that the legislature intended the courts to have any discretion in the application of the plain language of the statute. In *Griffin*, Justice Rehnquist stated:

> "It is enough that Congress intended that the language it enacted would be applied as we have applied it. The remedy for any dissatisfaction with the results in particular cases lies with Congress and

not with this court. Congress may amend the statute; we may not."

It appears that the punitive effect of the West Virginia statute can be quite harsh and, in fact, is very harsh in this particular case. This, alone, however, is not sufficient reason for this court to declare the statute unconstitutional. The United States Supreme Court has upheld the Federal statute which appears on its face to be even more harsh than the West Virginia statute. The Federal statute contains no cut-off limit while the West Virginia statute does have a cut-off limit of thirty days.

It will be noted that the summary judgment applies only to the corporate defendant and not to the three individual defendants named in this proceeding.

It is further ordered that the defendants shall be responsible for all costs incurred in this matter, as well as a reasonable attorney fee for plaintiffs' counsel. Counsel for plaintiffs shall submit their petition for fees and reasonable costs within sixty days after entry of an order consistent with this opinion.

Sincerely yours,

/s/ J. Zane Summerfield
J. ZANE SUMMERFIELD

JZS:bf

CC Court file

APPENDIX B

[SEAL]

TWELFTH JUDICIAL CIRCUIT
OF WEST VIRGINIA
FAYETTE COUNTY
J. ZANE SUMMERFIELD, JUDGE
FAYETTEVILLE, WEST VIRGINIA 25840

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November 30, 1983

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Dear Sirs:

Re: Melvin Kessler, et al

Vs: Civil Action 82-C-883
Long-Airdox Company, a corp.

Vs: International Union of Automobile, Aerospace and Agricultural Implement Workers of America, Local Union No. 772, et als.
Third Party Defendants

The court has carefully considered the motion of the third party defendants to dismiss the third party complaint against them and is of the opinion that the motion should be sustained.

One reason for sustaining the motion to dismiss is that the third party complaint fails to state a cause of action. Said complaint alleges that the third party defendants failed to agree to the company's proposal made on August 8, 1980, and alleges that the third party defendants made certain suggestions that payment of benefits could be postponed under certain condition. This court is of the opinion that even if such allegations are true that they do not constitute a cause of action against the third party defendants. The National Labor Relations Act specifically provides that neither party in labor negotiations are required to enter into any agreement or make any concessions. Furthermore, the providions of Chapter 21, Article 5 of the West Virginia Code, often referred to as the West Virginia Wage Payment and Collection Act, specifically provides that none of the statutory rights thereby created for the benefit of employees may be waived. There are now some exceptions to this rule as a result of statutory amendment which has occurred since the dispute involved in this litigation. At the time this case arose, however, there were no such exceptions.

The court views the third party complaint as an attempt to impose liability for conduct which is specifically protected under applicable federal statutes.

This court is also of the opinion that the international union and the local union cannot be sued as entities, nor can judgments be rendered against them, unless the proceeding against the unincorporated association includes joinder of a representative group of its members, officers or other persons holding responsible positions. We are of the opinion that there has not been a representative group of officers, members or representatives joined as parties in the third party complaint and therefore this court lacks jurisdiction to proceed.

Counsel will please prepare an order for entry consistent with this opinion.

Sincerely yours,

/s/ J. Zane Summerfield
J. ZANE SUMMERFIELD

JZS:bf

CC Robert S. Baker, Esquire
Ralph C. Young, Esquire
Ms. Emily Spieler

APPENDIX C

[SEAL]

TWELFTH JUDICIAL CIRCUIT
OF WEST VIRGINIA
FAYETTE COUNTY
J. ZANE SUMMERFIELD, JUDGE
FAYETTEVILLE, WEST VIRGINIA 25840

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November 10, 1983

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Washington, DC 20036

Dear Counselors:

Re: Melvin Kessler, et al

Vs: 80-C-883
Long-Airdox Company,
Division of Marmon Group,
Inc., et al

On August 1, 1983, Lee E. Miller, as counsel for the defendants, filed a motion for reconsideration and memorandum in support thereof. I have carefully considered the motion and memorandum, the plaintiffs' memorandum in opposition to said motion dated September 6, 1983, and defendants' reply memorandum which appears to be undated. The matter was argued before the court on September 20, 1983. I have carefully considered all of the above and am of the opinion that the motion for reconsideration should be and the same is hereby denied.

The main thrust of the motion to reconsider is that recent federal decisions have held that this type of proceeding is preempted under the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1102 *et seq.*

In the beginning I would point out that the defendants have twice attempted to remove this civil action to the Federal Court system and the Federal Courts have twice refused to accept jurisdiction. I believe this is largely due to the fact that a casual reading of the pleadings reveals that this case primarily involves an attempt by the plaintiffs to recover under a state statute for failure to pay wages due and owing at the time of the plant closure. It appears that each of the plaintiffs claim money due for casual hours and that all except one of plaintiffs claim money owed for "break time" hours actually worked but unpaid at the time they were separated from employment. Fewer than ten percent of the plaintiffs were owed vacation pay. This court is of the opinion that such claims are not benefits due under an "employee welfare benefit plan" as that term is used in 29 U.S.C. § 1002(1). Neither does this case involve money due under an "employee pension benefit plan" as defined in the federal statutes.

The court notes that nowhere in defendants' motion, memorandum or argument is there any indication that

Long-Airdox has ever created a plan description, filed annual reports or other information required by ERISA 29 U.S.C. §§ 1022-1024 with respect to the vacation benefits due its employees.

Counsel for defendants also raised the issue that they should be permitted to pursue discovery under motions which were pending at the time this court issued the letter opinion dated May 27, 1982. That opinion granted summary judgment for plaintiffs and by implication indicated that the discovery motions should be overruled. Ths court at this time expressly rules that the defendants' motions for discovery should be and the same are hereby denied.

Counsel will please prepare an order consistent with these opinions.

Sincerely yours,

/s/ J. Zane Summerfield
J. ZANE SUMMERFIELD

JZS:bf

CC Lee Adler, Esquire
Robert J. Smith, Esquire
Court file

APPENDIX D

[SEAL]

TWELFTH JUDICIAL CIRCUIT
OF WEST VIRGINIA
FAYETTE COUNTY
J. ZANE SUMMERFIELD, JUDGE
FAYETTEVILLE, WEST VIRGINIA 25840

TELEPHONE
(304) 574-2250

July 1, 1983

Robert S. Baker, Esquire
Attorney at Law
P. O. Box 964
Beckley, WV 25801

Ralph C. Young, Esquire
Attorney at Law
P. O. Drawer AA
Oak Hill, WV 25901

Dear Sirs:

Re: Melvin Kessler, et als

Vs: Long-Airdox Company,
a corporation
Civil Action 80-C-883

The court has carefully considered the plaintiffs' motion for summary judgment, all of the pleadings which appear to be material for purposes of the motion, the affidavits which have been filed, the briefs of counsel and arguments. I am of the opinion that there is no dispute as to any material facts on the issue of liability of the defendant, Long-Airdox Company, a corporation, under the provisions of Chapter 21, Article 5, Section 4 of the West Virginia Code. Therefore the motion for summary judgment should be and is hereby sustained on the issue of liability.

It is apparent that further hearings will need to be held and evidence taken with respect to the amount of damages to be awarded.

The undisputed facts established that the collective bargaining agreement between Long-Airdox Company and United Automobile Workers' Local 772 expired on April 4, 1980, and the U.A.W. went on strike. On July 29, 1980, representatives for the Company announced that it was closing its Oak Hill plant effective immediately. Also on July 29, 1980, the U.A.W. telegraphed to Long-Airdox its acceptance of the final contract offer and stated that its members would return to work on Monday August 4, 1980. On July 31, 1980, the Company advised the U.A.W. that no work would be available on August 4, 1980, or on any subsequent date. Thereafter on August 5, 1980, the Company recalled three employees who began work on August 11, 1980. The three employees returning to work are not parties to this action.

The next regular payday after August 1, 1980, was Thursday August 7, 1980. On or after September 9, 1980, the defendant, Long-Airdox Company, paid to plaintiffs the money which it conceded was owed to them.

There remains in issue and the court makes no ruling with respect to whether wages, in the form of accrued vacation time, casual days and break-time, was payable under the terms of the expired contract or under the terms of the new contract.

The provisions of Chapter 21, Article 5, Section 4 of the West Virginia Code provide the following:

> "(b) Whenever a person, firm, or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.
>
> "(d) When work of any employee is suspended as a result of a labor dispute, or when an employee for

any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.

"(e) If a person, firm or corporation shall, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at his regular rate for each day the employer is in default, until he is paid in full, without rendering any service therefore: Provided, however, that he shall cease to draw such wages thirty days after such default . . .".

It is clear from a reading of the above statute that it is immateral whether the plaintiffs were laid off or discharged from their employment as of August 1, 1980. In either case more than thirty days lapsed before any wages as defined in the statute were paid.

The defendant seeks to justify its failure to pay wages within the time prescribed by statute upon its inability to agree with the U.A.W. as to the amount of benefits and whether the benefits were payable under the wage scale of the old contract or the new one. This position is not valid for the reason that the applicable statute creates individual rights of individual employees and imposes an absolute duty upon the employer to make that payment. This is so irrespective of any agreement or waiver which might be executed by the employee or any other person. See Chapter 21, Article 5, Section 10 which provides:

"Except as provided in section thirteen (§ 21-5-13), no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as

a condition of such payment shall be null and void. (1975, c.147)"

At a minimum the defendant owed to its employees wages due under the rate of the old contract. Its failure to make such payment is clearly in violation of Section 21-5-4 of the West Virginia Code. Whether the defendant is entitled to an affirmative defense of "good faith dispute" for the difference between the wages calculated under the old contract and as calculated under the new contract is a matter which the court does not rule upon at this time. Such a ruling, of course, must be made prior to a final determination of the damages to be awarded.

In reaching this decision the court has relied heavily on Farley v. Zapata Coal Corp., W. Va. 281 S.E. 2d 238 (1981). I understand that this case interpretates the law of West Virginia as it existed in July and August 1980. The amendment of the statute by the legislature after the Farley v. Zapata decision was a very sensible legislative amendment but is at a definite variance from the law as it existed in 1980. The material part of that amendment provided that nothing contained in the statute shall require fringe benefits to be calculated contrary to any agreement between an employer and his employees which does not contradict the provisions of the article. See W. Va. Code Section 21-5-1-(c).

Counsel will please prepare an order for entry consistent with this opinion.

Sincerely yours,

/s/ J. Zane Summerfield
J. ZANE SUMMERFIELD

JZS:bf

APPENDIX E

[SEAL]

TWELFTH JUDICIAL CIRCUIT
OF WEST VIRGINIA
FAYETTE COUNTY
J. ZANE SUMMERFIELD, JUDGE
FAYETTEVILLE, WEST VIRGINIA 25840

TELEPHONE
(304) 574-2250

May 27, 1982

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Lee E. Miller, Esquire
Seyforth, Shaw, Fairweather & Geraldson
Attorneys at Law
1111 19th Street, NW 5th Floor
Washington, DC 20036

Dear Counselors:

Rs. Melvin Kessler, et al

Vs: 80-C-883
Long-Airdox Company,
Division of Marmon Group,
Inc., et al

I have carefully considered several of the motions pending in this case together with the briefs filed by counsel for the parties and the argument of counsel. My ruling with respect to the five motions which I believe are now ready for a decision by this Court are as follows:

1. DEFENDANTS' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION. From defendants' amended complaint it is apparent that this is an action to recover liquidated damages and attorney fees pursuant to the provisions of Chapter 21, Article 5 of the West Virginia Code. The amended complaint also alleges the rights to recover on other grounds and that will be covered by a separate heading of this opinion.

The initial problem encountered with the motion to dismiss for lack of subject matter jurisdiction is a determination as to whether the West Virginia Wage Payment and Collection Act, West Virginia Code Chapter 21, Article 5 is unenforcible because of the pre-emption by federal statutes. I am unable to find any specific language in federal statutes expressing the intent of congress to pre-empt the right of state courts to act under state laws concerning the rights of employees to be promptly paid full wages for services rendered. The question of payment of wages has been an area of traditional concern to state government and both statutory and common law remedies are prevalent throughout the various states. This was no doubt known to congress and if they had intended exclusive jurisdiction for the National Labor Relations Board, various administrative federal agencies and federal courts they surely would have included some express language to that effect. Their failure to do so therefore raises the strong implication that no such intent existed.

> Our cases have consistently recognized that a congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer than an intent to pre-empt laws directed spe-

cifically at concerted activities. *New York Telephone Company v. New York State Department of Labor* 99 S.Ct. 1328, 59 L.Ed.2d 553.

In *Amalgamated Association of Motor Coach Employees v. Lockbridge*, 91 S.Ct. 109, 29 L.Ed. 2d 473 the following language is found:

> The precise extent to which state law must be displaced to achieve those unifying ends sought by the national legislature has never been determined by the Congress. This has, quite frankly, left the Court with few available options. We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers, and unions: obviously, much of this is left to the States.

In the fairly recent case of *Barrentine v. Arkansas-Best Freight System* 101 S.Ct. 1437, 67 L.Ed. 2d 641 our highest court has again approved the principal that "not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers".

This decision permitted employees to bring suit in the federal court system for wages claimed to be due even though their local union had previously submitted a wage claim for them, based on the same underlying facts, to a joint grievance committee pursuant to the provisions of the union's collective-bargaining agreement.

I believe from a reading of the cases above noted that the right of an individual employee or employees to file suit in a state court, based upon a state statute for col-

lection of wages, is not a matter pre-empted or reserved exclusively to federal courts or agencies. It is clear that the applicable state statute intended to create rights for individual employees and not for a bargaining unit as such.

It should be noted that the union representing defendants' employees as their bargaining agent is not a party to these proceedings except for the third party complaint pending against them.

I also notice from the file that our federal district court has had this case before it on two separate occasions upon defendants' motions to remove. On each occasion the federal district judge has remanded the matter to this court.

Defendants argue that it would have been impossible for them to comply with both the NLRA and West Virginia Code Chapter 25, Article 5. This court must respectfully disagree. Defendants conceded from the beginning that they owed certain wages and fringe benefits to plaintiffs, its former employees. The only disagreement was the amount to be paid. Basically, the dispute was over whether payment should be made under provisions of the recently expired contract or the contract negotiated almost contemporaneously with the decision to close the plant.

Under such circumstances the defendants could certainly have complied, at least partially, with state laws by tendering the lesser payment under the old contract provisions. This certainly would not have been in violation of provisions of the NLRA. Defendant elected instead to offer payment under the old contract but upon specific conditions which would have required relinquishment of any and all further claims. In doing so it may have violated both the NLRA and applicable West Virginia Code provisions.

What defendant obviously should have done was to tender the amount admittedly due and then leave to other methods the resolution of matters in issue.

Defendants' failure and refusal to pay wages and fringe benefits admittedly owing was in my opinion a violation of the provisions of the West Virginia Wage Payment and Collection Act.

The defendants' motion to dismiss for lack of subject matter jurisdiction is hereby overruled.

2. DEFENDANTS' MOTION TO COMPEL PLAINTIFFS TO BASE JURISDICTION ON SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT. Defendants take the position that even if Chapter 25, Article 5 of the West Virginia Code applies, then Section 301 of the Labor-Management Relations Act requires plaintiffs to first exhaust all contractual remedies before seeking the statutory remedy afforded by the State of West Virginia. This is another way of saying that federal laws pre-empt the powers of state courts to grant relief to employees seeking to collect wages. This matter has been fully covered already in this opinion.

It appears that plaintiffs, or their bargaining agent (union) probably do have a remedy under Section 301 of the LMRA. Neither expressly or impliedly however is there any indication that it is the exclusive remedy or that it preempts available state remedies. Where more than one remedy exists plaintiffs are entitled to make an election of remedies and also to make an election of forum so long as both venue and jurisdiction requirements are met.

The motion to compel plaintiffs to amend their complaint and to base jurisdiction on Section 301 of the LMRA hereby overruled.

3. MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM. The instant dispute centers upon

claims for fringe benefits in the form of vacation pay, casual day pay and break-time for former employees of the Long-Airdox Division of the Marmon Group, Inc. Defendants in this motion, take the position that such fringe benefits are not covered by the applicable West Virginia statutes. They also contend that the regulations adopted by the West Virginia Department of Labor are void insofar as such regulations attempt to include "fringe benefits" within the meaning of "wages."

This issue was laid to rest in the case of *Farley v. Zapata Coal Corporation*, 281 SE 2d 238. In that opinion the W.Va. Supreme Court of Appeals stated:

> "Fringe benefits, including vacation pay, are also deemed wages by regulations promulgated by the West Virginia Commissioner of Labor pursuant to the Wage Payment and Collection Act, W.Va. Code § 21-5-1 et seq.".

At page 242 in *Farley v. Zapata* the following language is found:

> "It was therefore error for the court below to rule that the appellants could not enforce mechanics' lien for accrued vacation pay, compensation for unused sick leave days *or any other fringe benefits.*

Accordingly the motion to dismiss for failure to state a claim upon which relief can be granted is hereby overruled.

4. MOTION TO STRIKE CLAIM FOR PUNITIVE DAMAGES. Since plaintiffs' claim is based solely upon the provisions of West Virginia's Wage Payment and Collection Act and such Act makes no provision for punitive damages of the type claimed in the amended complaint this Court is of the opinion that punitive damages are not recoverable under the Act except to the extent that the provisions of the Act tend by their very nature to punish. It is ably stated by Justice Miller in his Dissenting Opinion in *Farley* v. *Zapata* supra, that

21-5-4 (e) which provides for liquidated damages is in effect a penal statute. I am inclined to agree.

Therefore, the motion to strike the claim for punitive damages is sustained.

5. MOTION TO STRIKE CLAIM AGAINST WILLIS J. GOLDSMITH. The defendant, Willis J. Goldsmith, Attorney at Law, of Washington, D.C., was one of counsel representing, advising, counseling and negotiating for Long-Airdox Company during the labor dispute giving rise to this litigation. Neither the amended complaint nor the affidavit of the President of Local No. 772 justifies any conclusion except that Mr. Goldsmith was at all times acting in his capacity as attorney at law and not in an individual capacity. He was not as such an employer of plaintiffs.

The implications of allowing legal counsel to be joined as parties in litigation arising from labor negotiations are so far reaching that they compel courts to carefully scrutinize all such claims. In the absence of strict allegations of misconduct far surpassing those alleged in this complaint, or in the affidavit filed in support of the claim, this Court is of the opinion that the motion should and the same is hereby sustained.

Counsel will please prepare an order for entry consistent with the above opinions.

It is obvious that there remains other important matters to be addressed by the Court and counsel in connection with this case. We will look forward to cooperating with counsel in any possible way so as to expedite a final conclusion of this rather complicated piece of litigation.

Sincerely yours,

/s/ J. Zane Summerfield
J. ZANE SUMMERFIELD

JZS:bf

APPENDIX F

IN THE CIRCUIT COURT OF FAYETTE COUNTY
STATE OF WEST VIRGINIA

Civil Action No. 80-C-883

MELVIN KESSLER, *et al.*,
Plaintiffs,

vs.

LONG-AIRDOX COMPANY, DIVISION OF THE MARMON GROUP, INC. (MICHIGAN), a corporation, *et al.*,
Defendants.

FINAL ORDER

On a former day came the plaintiffs, by their counsel, Robert S. Baker, Emily Spieler and Lee H. Adler, and moved this Court for Final Summary Judgment on the issue of liquidated damages under the West Virginia Wage Payment and Collection Act, West Virginia Code section 21-5-1, *et seq.*, and particularly section 21-5-4(e). It appearing to the Court that partial Summary Judgment on the issue of liability has already been entered in favor of the plaintiffs, and that the parties hereto have stipulated as to the applicable wage rates of the individual plaintiffs, which wage rates are reflected in the Appendix attached hereto; the Court having heard oral argument and having read the briefs filed by counsel for the parties; and after due consideration, reached certain conclusions which are set forth in an opinion letter dated January 2, 1985, attached hereto and made a part hereof; particularly concluding that the facts are undisputed that wages were due and owing to the individual plaintiffs on or before August 7, 1980, and were

not paid until on or after September 9, 1980, a period in excess of thirty days, and that, therefore, each plaintiff is entitled to thirty days' pay as and for liquidated damages at his respective wage rate, as set out in the Appendix attached hereto and made a part hereof. In accordance with said opinion letter and the West Virginia Code, it is hereby ORDERED as follows:

1. Each individual plaintiff shall have judgment against defendant corporation for liquidated damages, in the amount reflected on the Appendix attached hereto, with interest on said amount at the rate of ten percent per annum, simple interest, from July 5, 1981, until paid, pursuant to Section 56-6-31 of the West Virginia Code.

2. Defendant corporation shall be responsible for all costs incurred in this matter, as well as reasonable attorneys fees for plaintiffs' counsel. Counsel for plaintiffs shall submit their petition for fees and reasonable costs within sixty (60) days after entry of this Final Order.

3. Plaintiffs claims against the natural person defendants, and all counterclaims against plaintiffs, shall be and they hereby are dismissed.

Defendants except and object to the provisions of this Final Order.

ORDER:

Entered this 13th day of May, 1985.

J. ZANE SUMMERFIELD
Judge

A TRUE COPY of an order entered May 13, 1985

TESTE:

/s/ Herbert A. Mann
Circuit Clerk
Fayette County, WV

Presented by:

/s/ Robert S. Baker
ROBERT S. BAKER
Attorney at Law
207 Fourth Street
Beckley, West Virginia 25891
Counsel for Plaintiffs

Approved by:

_____

RONALD A. LINDSAY
Seyfarth, Shaw, Fairweather
& Geraldson
1111 19th Street, N.W.
Washington, D.C. 20036
Counsel for Defendants

Name	Sequence	Hourly Rate	Liquidated Damages
Robert Wolney	1	$8.96	$2,150.40
Euell C. James	2	9.13	2,191.20
Edward C. Comer	4	9.13	2,191.20
Charles B. Thompson	5	9.13	2,191.20
Oather W. Ruble	6	8.96	2,150.40
Charles E. Scott	7	9.69	2,325.60
William A. Saye	9	8.96	2,150.40
Arthur Mills	11	8.96	2,150.40
Harold C. Painter	12	8.96	2,150.40
Russell R. Vass, Jr.	13	8.96	2,150.40
Ronald S. Smith	15	8.96	2,150.40
Junior Pate	16	8.96	2,150.40
Marvin O. Hall	17	8.96	2,150.40
Cecil McCormick	19	8.96	2,150.40
Ralph W. Candler	21	8.96	2,150.40
W. F. Drennen, Jr.	22	8.96	2,150.40
Kelly R. Williams	23	8.79	2,109.60
Jack O. Crawford	24	8.96	2,150.40
Don C. Jarrett	27	8.96	2,150.40
Bobby K. Sutphin	30	8.96	2,150.40
Ronald J. Arrington	31	8.96	2,150.40
John R. Walkup	32	8.96	2,150.40
Billy L. Johnson	34	8.96	2,150.40
Bobby G. Johnson	36	8.96	2,150.40
Raymond N. Belmont	37	9.69	2,325.60
Harold B. Green	38	8.26	1,982.40
Homer D. Skidmore	39	8.96	2,150.40
Meldon S. Goins	40	8.84	2,121.60
Louis F. Burns	41	8.79	2,109.60
Robert R. Sloan	42	8.79	2,109.60
Okey LaFon	43	8.96	2,150.40
Carl C. Walton	45	8.26	1,982.40
Conard R. Wriston	46	8.96	2,150.40
Donald P. Renfro	47	8.96	2,150.40
Carl E. Burley	49	8.45	2,028.00
Cletis R. Fagg	50	8.96	2,150.40
Karl H. Harris	51	8.96	2,150.40
Rodney R. Jones	53	8.96	2,150.40
Andrew J. Warrick	54	8.84	2,121.60

Name	Sequence	Hourly Rate	Liquidated Damages
Ray N. Chapman	56	8.96	2,150.40
Roland N. Massey	57	8.96	2,150.40
Robert E. Neely	58	8.96	2,150.40
Carroll J. Hickman	59	8.26	1,982.40
Garnet H. Moore	60	8.26	1,982.40
Jackie T. Hicks	62	9.69	2,325.60
Ellis E. Riffe	63	8.96	2,150.40
Aubra W. Bragg	64	8.96	2,150.40
Richard C. Pack	65	8.96	2,150.40
Gilbert C. Hankins	68	8.96	2,150.40
Jerry J. Massey	69	8.26	1,982.40
Hubert I. Osborne	70	8.26	1,982.40
Roger D. Riddle	71	8.96	2,150.40
William D. Stone	72	8.96	2,150.40
Franklin D. Delung	73	8.96	2,150.40
Joseph L. Smith	74	8.96	2,150.40
Shirley Ball	75	8.96	2,150.40
Ronald R. Seco	77	8.96	2,150.40
Lloyd A. Lewis	78	8.26	1,982.40
Eddie A. Walker	79	8.96	2,150.40
Earl B. Vannatter	81	8.96	2,150.40
Thomas M. Wilson	83	8.96	2,150.40
John W. Bibb	84	8.96	2,150.40
Woodrow W. Payne	86	8.96	2,150.40
Cleve R. Legg	87	8.26	1,982.40
Cecil L. McCormick	88	8.79	2,109.60
Paul A. Legg	90	8.79	2,109.60
Delmer L. Basham	91	8.96	2,150.40
Kenneth L. Browning	92	8.26	1,982.40
Sebert R. Stover, Jr.	93	8.96	2,150.40
Clark D. Johnson	94	8.26	1,982.40
James A. Mason	95	8.26	1,982.40
Robert E. Mahood	96	8.96	2,150.40
Elmer U. Peaks	97	8.96	2,150.40
John W. Richmond, Jr.	98	8.96	2,150.40
Steven A. Dorsey	99	8.96	2,150.40
Thomas A. Mason	100	8.79	2,109.60
Fred Sherer	101	8.96	2,150.40

Name	Sequence	Hourly Rate	Liquidated Damages
Tekoah H. Hall	103	8.96	2,150.40
Robert L. Bragg	104	8.26	1,982.40
Thomas N. Broach, Jr.	107	8.96	2,150.40
George W. Sparks	108	8.96	2,150.40
Arthur J. Henry	109	8.96	2,150.40
James H. Gilkerson	111	8.96	2,150.40
Kenneth I. Akers	113	8.96	2,150.40
John W. Fedukovich	114	8.96	2,150.40
Philip Fedukovich	115	8.96	2,150.40
Samuel L. Davis	116	8.96	2,150.40
John D. Webb	117	8.96	2,150.40
Joseph E. Hunt	118	8.96	2,150.40
Richard Nugen	120	8.96	2,150.40
Terry L. Pack	123	8.96	2,150.40
Billy Ray Ayers	124	8.96	2,150.40
Ronald Lee Eagle	125	8.96	2,150.40
Melvin R. Kessler	126	8.96	2,150.40
Mitchell D. Browning	127	8.96	2,150.40
James H. Lopez	128	8.96	2,150.40
Reginald E. Dodd	129	8.96	2,150.40
Arnette D. Garten	130	8.96	2,150.40
Johnny R. Davis	131	8.96	2,150.40
Thomas Ballard Tincher	133	8.96	2,150.40
Jimmy D. Harvey	134	8.96	2,150.40
James L. Mann	135	9.13	2,191.20
Homer Vest, II	136	8.96	2,150.40
Lonnie R. White	137	8.96	2,150.40
Brenton Lee Davis	138	8.96	2,150.40
Gary W. Matherly	141	8.96	2,150.40
Oather Smith	143	8.45	2,028.00
David Lee Strunk	144	8.96	2,150.40
William McClellan	145	8.96	2,150.40
Russell Lee Compton	146	8.96	2,150.40
Sherman Steve Sexton	147	8.96	2,150.40
Herbert T. Coleman, Jr.	148	8.96	2,150.40
Dempsey D. Querry	149	8.26	1,982.40
Lloyd Legg	150	8.96	2,150.40
Ralph Middleton	151	8.96	2,150.40

Name	Sequence	Hourly Rate	Liquidated Damages
Hermel N. Fink, Jr.	152	8.96	2,150.40
Daniel Herbert Brooks, Jr.	154	8.96	2,150.40
Aaron Dale Forren	157	8.96	2,150.40
Edwin McClelland Skaggs	159	8.26	1,982.40
Russell F. Thomas	160	8.96	2,150.40
Thomas L. Fair	161	8.96	2,150.40
Allen Eugene Hurley	162	8.84	2,121.60
Robbie W. Cobb	163	8.96	2,150.40
Harold W. Duncan	164	8.96	2,150.40
Robert H. Walker	165	8.26	1,982.40
Jack T. Jarrett	166	8.96	2,150.40
Randall K. Matherly	167	8.96	2,150.40
Donald C. Bragg	170	8.96	2,150.40
James A. Benger	171	8.96	2,150.40
Johnnie R. Wesley	172	8.96	2,150.40
Jeffrey W. Mason	173	8.96	2,150.40
James R. Meadows	174	8.96	2,150.40
Lemuel L. Blevins	176	8.96	2,150.40
David V. Sizemore	177	8.96	2,150.40
Kenneth W. Buchanan	178	8.96	2,150.40
Steve A. Hysell	179	8.26	1,982.40
Howard F. Louisos	181	8.26	1,982.40
Daniel R. Price	182	8.96	2,150.40
William H. Warrick	183	8.96	2,150.40
Donald C. Gunnoe	184	8.26	1,982.40
Clayton C. Casto	185	8.96	2,150.40
Billy W. Lanham	186	8.96	2,150.40
James L. Mathews	187	8.26	1,982.40
Kenneth R. Sexton	188	8.96	2,150.40
Vernon L. Ward	189	8.96	2,150.40
Thelma L. Reynolds	190	8.26	1,982.40
Terry L. Price	191	8.96	2,150.40
Gary K. Williams	192	8.96	2,150.40
Richard McVey	194	8.96	2,150.40
Samuel C. Price	196	8.96	2,150.40
Johnnie S. McDonald	198	8.96	2,150.40

APPENDIX G

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 6th day of November, 1985, the following order was made and entered, to-wit:

MELVIN KESSLER, *et al.*

vs.

LONG-AIRDOX COMPANY, DIVISION OF THE MARMON GROUP, INC., etc.

On a former day, to-wit, September 12, 1985, came the petitioner, Long-Airdox Company, Division of the Marmon Group, Inc., (Michigan), by Seyfarth, Shaw, Fairweather & Geraldson and Ronald A. Lindsay, Hamilton & Mooney and Ralph C. Young, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Fayette County rendered on the 13th day of May, 1985, with the record therein accompanying the petition, and memorandum by Robert S. Baker and Lee H. Alder, counsel for Melvin Kessler, et al., in opposition to granting the appeal, which being seen and inspected by the Court the appeal prayed for is refused.

A True Copy

Attest /s/ George W. Singleton
Clerk
Supreme Court of Appeals

APPENDIX H

United States Constitution, art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The NLRA, §§ 7 and 8, 29 U.S.C. §§ 157 and 158, which provide in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .
>
> It shall be an unfair labor practice for an employer—
>
> . . . .
>
> (a)(5) to refuse to bargain collectively with the representatives of his employees . . .
>
> . . . .
>
> (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel

> either party to agree to a proposal or require the making of a concession . . .

Section 301 of the LMRA, 29 U.S.C. § 185, which provides in pertinent part:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 302(c) of the LMRA, 29 U.S.C. § 186(c), which provides in pertinent part:

> The provisions of this section shall not be applicable . . .
>
> (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs . . .

Sections 3(1) and 514(a) of ERISA, 29 U.S.C. §§ 1002(1) and 1144(a), which provide in pertinent part:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident,

disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186 (c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

. . . .

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

The West Virginia Wage Payment and Collection Act, W.Va. Code § 21-5-4, which provides in pertinent part:

(b) Whenever a person, firm or corporation discharges an employee, such person, firm or corporation shall pay the employee's wages in full within seventy-two hours.

(c) Whenever an employee quits or resigns, the person, firm or corporation shall pay the employee's wages no later than the next regular payday. . .

(d) When work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the person, firm or corporation shall pay in full to such employee not later than the next regular payday . . . wages earned at the time of suspension or layoff.

(e) If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount due, be liable to the employee for liquidated damages in the amount of wages at this regular

rate for each day the employer is in default, until he is paid in full, without rendering any service therefore: Provided, however, that he shall cease to draw such wages thirty days after such default. . .

29 C.F.R. § 2510.3-1, which provides in pertinent part:

Employee welfare benefit plan.

(a) *General.* (1) The purpose of this section is to clarify the definition of the terms "employee welfare benefit plan" and "welfare plan" for purposes of Title I of the Act and this chapter by identifying certain practices which do not constitute employee welfare benefit plans for those purposes. In addition, the practices listed in this section do not constitute employee pension benefit plans within the meaning of section 3(2) of the Act, and, therefore, do not constitute employee benefit plans within the meaning of section 3(3). Since under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I of the Act, the practices listed in this section are not subject to Title I.

(2) The terms "employee welfare benefit plan" and "welfare plan" are defined in section 3(1) of the Act to include plans providing "(i) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (ii) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Under this definition, only plans which provide benefits described in section 3(1)(A) of the Act or in section 302(c) of the Labor-Management Relations Act, 1947 (hereinafter

"the LMRA") (other than pensions on retirement or death) constitute welfare plans. For example, a system of payroll deductions by an employer for deposit in savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of the Act because it does not provide benefits described in section 3(1)(A) of the Act or section 302(c) of the LMRA. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of the Act and, therefore, is not an employee benefit plan within the meaning of section 3(3) of the Act).

(3) Section 302(c) of the LMRA lists exceptions in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6) (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are ". . . holiday, severance or similar benefits". Thus, the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).

(4) Some of the practices listed in this section as excluded from the definition of "welfare plan" or mentioned as examples of general categories of excluded practices are inserted in response to questions received by the Department of Labor and, in

the Department's judgment, do not represent borderline cases under the definition in section 3(1) of the Act. Therefore, this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(1).

(b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as—

(i) Overtime pay,

(ii) Shift premiums,

(iii) Holiday premiums,

(iv) Weekend premiums;

(2) Payment of an employee's normal compensation out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties, for example—

(i) Payment of compensation while an employee is on vacation or absent on a holiday,

including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons,

(ii) Payment of compensation to an employee who is absent while on active military duty,

(iii) Payment of compensation while an employee is absent for the purpose of serving as a juror or testifying in official proceedings,

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

. . . .

Supreme Court, U.S.
FILED
FEB 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LONG-AIRDOX COMPANY, DIVISION OF THE MARMON GROUP, INC.,

Petitioner,

v.

MELVIN KESSLER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

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Dated: February 18, 1986

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1189

LONG-AIRDOX COMPANY, DIVISION
OF THE MARMON GROUP, INC.,

Petitioner,

v.

MELVIN KESSLER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

Petitioner seeks a writ of certiorari from an unreported decision of the Circuit Court of Fayette County, West Virginia, to review an adverse decision in what is a simple action for liquidated damages under West Virginia's Wage Payment and Collection Act, *West Virginia Code* §21-5-1, *et seq.* It brings its petition for a writ of certiorari despite the refusal by The West Virginia Supreme Court Of Appeals, on two separate applications, to hear its appeal. The first of those appeal attempts was in 1984, after petitioner received an adverse decision on the issue of liability

for liquidated damages. At that time, petitioner did not seek review from this Court. The second such appeal attempt came after the Final Order specifying individual damages was entered by the Circuit Court of Fayette County, West Virginia. The instant petition for a writ of certiorari follows the second refusal of the West Virginia Supreme Court Of Appeals to accept petitioner's appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

In its statement of the constitutional provisions, statutes and regulations involved in this case, petitioner has neglected to mention and/or reproduce several important statutes and regulations. These are the following: *West Virginia Code* §§21-5-1(c) and 21-5-10; as well as West Virginia Labor Commissioner Administrative Regulations 100-23 and 305. These missing statutes and regulations are reproduced in Appendix A to this Brief In Opposition.

STATEMENT OF THE CASE

This action was filed in September of 1980 by three individual plaintiffs on behalf of themselves and their approximately 180 co-workers who lost their jobs when the Long-Airdox plant in Oak Hill, West Virginia, permanently shut its doors. Through a multitude of motions and voluminous briefings, the petitioner successfully has delayed, and to this date prevented respondents from securing the liquidated damages which rightfully are theirs under West Virginia's Wage Payment and Collection Act, *West Virginia Code* §21-5-1, *et seq.* These statutes were

designed to protect employees from employers who, for whatever reason, fail or refuse to pay wages in a timely manner. Petitioner, during the course of those briefings, has insisted on twisting and misrepresenting both Federal and West Virginia law applicable to the case. Ironically, petitioner seeks to blame the delay caused by its actions on the state court. See, Petition For A Writ Of Certiorari, at page 22 (hereinafter the format for such references will be: Pet. ___).

I. THE UNCONTESTED FACTS.

On or about April 10, 1980, at the expiration of their previous collective bargaining agreement, the members of Local 772 of the United Auto Workers (hereinafter "Local 772" or the "union") entered into a contract strike which was designed to secure favorable terms in a new collective bargaining agreement. On July 29, 1980, during the course of what was a bitter strike, the petitioner advised Local 772 that it was closing down the Oak Hill plant, and moving the work formerly done at that plant to its Virginia operations. Immediately upon receiving notice of the shut down, Local 772 advised the petitioner that they accepted the last contract offer made by petitioner, and that they would return to work on August 4, 1980.

On Monday, August 4, 1980, upon their arrival at the plant, the members of Local 772 learned that the plant had in fact been shut down, and that they had been either terminated or laid off. The next regular payday after their layoff came on August 7, 1980, which also was at least 72 hours after the termination of employment. On August 5, 1980, during negotiations, the petitioner and Local 772 determined that

three Local 772 officials with super-seniority would be rehired to perform janitorial duties at the plant. All other employees were laid off or terminated as of at least August 1, 1980, the Friday preceding the Monday the members of Local 772 appeared and were ready for work.

On August 8, 1985, petitioner presented the president of Local 772, Ed Travis, with a list of wages owed, and expressed willingness to pay the wages owed. However, it conditioned that willingness upon a demand that Mr. Travis, who was not a plaintiff in this action, release any claims that respondents might have concerning the calculation of their wages. At no time did petitioner actually tender payment either to Mr. Travis or to any of the respondents. The wages owed consisted of a mixture of casual hours, break time and regular vacation. Break time is wages earned in lieu of an afternoon break. All but one respondent was owed money for break time. Casual hours were earned by longevity at the company. Every respondent was owed money for his casual hours upon separation from the company. By contrast, fewer than ten percent of the respondents were owed for regular vacation. Such regular vacation, as well as the break time and casual hours, was paid out of the general assets of petitioner.

Despite numerous requests by the individual respondents for the wages owed to them under the collective bargaining agreement, petitioner persisted for over thirty days in failing to pay to respondents even the amount it admitted that it owed to them. Finally, on and after September 10, 1980, petitioner paid to respondents the amount it admitted that it owed. Shortly thereafter, respondents filed this ac-

tion, for themselves and the approximately 180 additional members of Local 772 who were not rehired (the original plaintiffs included all but three of the Local 772 members previously employed by petitioner), under the West Virginia Wage Payment and Collection Act, seeking liquidated damages for the delay in payment of wages owed.

The petitioner admitted it actually owed wages to respondents by paying those wages, albeit untimely. There is no dispute that a period in excess of 30 days passed between the time the wages were due and the time they were actually paid. No facts other than those mentioned above are relevant to this case.

II. ADDITIONAL FACTS RAISED BY THE PETITIONER

Petitioner further has persisted in putting forward an additional version of the facts in this case, which respondents have not sought to rebut because they are irrelevant and immaterial.[1] Since the laundry list of facts recited by petitioner in its petition for a writ of certiorari is predominantly irrelevant, largely inaccurate, and frequently unsupportable by the record; respondents do not wish to let the petitioner's version of the facts go unchallenged before this Court. What follows, although irrelevant to the legal decisions made by Judge Summerfield, is a recitation of respondents' understanding of the additional facts which took place in connection with this matter:

---

[1]This case was decided upon summary judgment, there being no material facts in issue. Very few pages of the approximately 600 page record in this matter are devoted to verified facts, the remainder being legal argument, notices, and unverified factual allegations. The Circuit Court determined that the undisputed facts were sufficient for decision.

Although petitioner had a duty to bargain over the results and effects of the shut down of the plant, it had no duty or right to bargain over the time for payment of wages it admittedly owed. Petitioner determined to play hardball with the wages owed in order to secure a favorable shut down agreement with Local 772. In fact, counsel for the petitioner was heard to say that it would not pay any wages until the issue of the pension plan had been resolved. At all times, both Local 772 and several individuals requested that petitioner pay the wages it conceded it owed to respondents.

However, petitioner consistently refused to pay respondents until such time as Mr. Travis signed documents foreclosing respondents' individual rights to grieve the size of their wages, a practice which had never been followed in the past in connection with the payment of wages. Mr. Travis rightfully refused to sign these documents, insisting that Long-Airdox pay the respondents what it conceded it owed to them.

Finally, on September 9, 1980, word leaked to petitioner that individuals were contemplating a wage claim action. On the following day, petitioner made all monies they admitted they owed available to respondents, and since that time apparently have paid all former employees according to petitioner's originally proposed rate schedules. Local 772 grieved the size of the payments, asserting that the plaintiffs should have been paid the wage rates prevailing under the new collective bargaining agreement. That grievance remains unresolved.

III. CONCLUSIONS OF THE COURT

On the basis of the uncontested facts, Judge Summerfield ruled that petitioner violated *West Virginia*

Code §21-5-4(d) by failing to pay respondents wages owed by the next regular payday after their layoff. He further concluded that the wages owed were not paid for more than thirty days following the date that they were due under the statute, and that therefore each respondent was entitled to thirty days wages as liquidated damages for the delay in payment, pursuant to *West Virginia Code* §21-5-4(e), plus statutory interest. Judge Summerfield also concluded that petitioner did not have a good faith defense since it did not timely pay the amount of wages it conceded it owed to respondents.

ARGUMENT

This Court should deny the petition for writ of certiorari in this matter because none of the reasons for granting the petition are present in this case. Some of the issues raised by petitioner have been decided recently by this Court. The other issues raised, in the clear absence of a conflict between the Circuits or state courts, are not of sufficient importance to be addressed at this time, and on this limited record.

I. THE NATIONAL LABOR RELATIONS ACT, 29 U.S.C. 151, *et seq.*, DOES NOT PRE-EMPT THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT.

Petitioners primary argument throughout this matter has been that the West Virginia Wage Payment and Collection Act is pre-empted by the National Labor Relations Act (NLRA), 29 U.S.C. §151, *et seq.* The upshot of this argument would be to deny the benefit of the Wage Payment and Collection Act to all unionized employees.

In its petition, Long-Airdox claims that the application of the Wage Payment and Collection Act interfered with its duty to bargain about the results or effects of plant shut down. See, Pet. 9-11. In arguing that the Wage Payment and Collection Act is therefore pre-empted by the National Labor Relations Act, petitioner has confused the two lines of pre-emption decisions issued by this Court, and has failed inexplicably to refer the Court to two recent decisions (one from last term) of this Court which preclude its pre-emption argument.

The most recent of these cases, *Metropolitan Life Ins. Co. v. Massachusetts,* ___U.S. ___, 105 S.Ct. 2380, ___L.Ed.2d ___(1985), is almost on all fours with the instant case. The other case, *New York Tel. Co. v. New York St. Dept of Labor,* 440 U.S. 519, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979) (statute providing unemployment benefits to striking employees not pre-empted), is also very instructive where, as here, the pre-emption issue is raised in the context of *Machinists* pre-emption. See, *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976).

Petitioner seems to rely on the line of pre-emption cases which began with *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). This line of cases calls for pre-emption of state law which regulates conduct which is arguably protected by Section 7, or arguably prohibited by Section 8, of the National Labor Relations Act. However, neither of those provisions of the NLRA are implicated by enforcement of the West Virginia Wage Payment and Collection Act under the circumstances of this case. See, *Metropolitan Life Ins.*

Co. v. Massachusetts, supra at ___, 105 S.Ct. at 2393-2395. As a result, the instant situation should be analysed under the standards of *Machinists* pre-emption.

The *Metropolitan Life* case involved circumstances analogous to those in the instant case. There, Metropolitan Life argued that a statute which required certain terms in all medical and hospital policies was pre-empted to the extent that it required those terms in insurance policies decided upon through collective bargaining. It was Metropolitan Life's position that since health benefits are a mandatory subject of bargaining, a law which interfered with the end result of that bargaining, rather than leaving the parties free to reach agreement about contract terms, must be pre-empted. 105 S.Ct. at 2395-2396. The only recent case on pre-emption decided by a unanimous Court, in *Metropolitan Life* this Court held that minimal state labor standards are not pre-empted, stating as follows:

> No incompatibility exists, therefore, between federal rules designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA.
>
> Accordingly, it never has been argued successfully that minimal labor standards imposed by other *federal* laws were not to apply to unionized employers and employees. Nor has Congress ever seen fit to exclude union-

ized workers and employers from laws establishing federal minimal employment standards. We see no reason to believe that for this purpose Congress intended state minimum labor standards to be treated differently from minimum federal standards.

Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA. Nor do they have any but the most indirect effect on the right of self-organization established in the Act. Unlike the NLRA, mandated-benefit laws are not laws designed to encourage or discourage employees in the promotion of their interests collectively; rather, they are in part "designed to give specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive" the mandated health insurance coverage. Nor do these laws even inadvertently affect these interests implicated in the NLRA. Rather, they are minimum standards "independent of the collective-bargaining process [that] devolve on [employees] as individual workers, not as members of a collective organization."

It would further few of the purposes of the Act to allow unions and employers to bargain for terms of employment that state law forbids employers to establish unilaterally. "Such a rule of law would delegate to unions and unionized employers the power to exempt themselves from whatever state labor

> standards they disfavored." It would turn the policy that animated the Wagner Act on its head to understand it to have penalized workers who have chosen to join a union by preventing them from benefiting from state labor regulations imposing minimal standards on non-union employers. (emphasis in original; citations omitted)
>
> 105 S.Ct. at 2397-2398.

The instant case similarly involves a state statute which creates minimal state labor standards. Instead of regulating the content of insurance policies, it provides minimal standards for the timely payment of wages owed to employees who are separated from employment. *West Virginia Code* §21-5-4 provides deadlines for payment of wages owed upon separation from employment, and liquidated damages for breach of those deadlines; *West Virginia Code* §21-5-1(c) defines the term "wages" as used in the statute; and §21-5-10 provides that the deadline provisions may not be set aside by private agreement. See also, West Virginia Labor Commissioner Administrative Regulations 100-23 and 305. These provisions apply neutrally to all employers and employees, whether unionized or not. Under the clear teachings of *Metropolitan Life*, these minimal labor standards statutes are not pre-empted by the NLRA.

On closer analysis, the West Virginia statutes in no way interfered with petitioners duty to bargain about the effects of plant shut down. Petitioner had no duty to bargain over wages admittedly owed. To the extent Local 772 sought additional payment, defendants had an obligation to pay what they agreed was owed within the time frame set by the West

Virginia Wage Payment and Collection Act, and negotiate later over any claimed additional payment due. The statute set the minimum standards below which the union would never seek payment. Petitioner should have stayed within the statute by timely paying what it conceded it owed.

It is well settled that unions can not waive rights given to employees by statutes. *Jewell Ridge Coal Corp. v. Local No. 6167, U.M.W.A.*, 325 U.S. 161, 65 S.Ct. 1063, 89 L.Ed. 1534 (1943). The decision in *Metropolitan Life* expands this rule to hold that employers and unions can not waive minimal state labor standards through the collective bargaining process. The law with respect to NLRA pre-emption in the context of this case is already crystal clear, and does not need further elucidation by this Court through the granting of the instant petition for a writ of certiorari.

II. SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT, 29 U.S.C. §185, DOES NOT PRE-EMPT THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT, NOR DOES IT LEAD TO AN EXHAUSTION OF REMEDIES REQUIREMENT.

Throughout the proceedings in this matter, petitioner has maintained that respondents' claim under the West Virginia Wage Payment and Collection Act is pre-empted by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185; and that, therefore, respondents have no cause of action since they did not exhaust the contractual grievance procedure. The effect of this position again would be to deny the benefits of the timely pay requirements of

the West Virginia Wage Payment and Collection Act to all unionized employees in the state.

The gravamen of the Complaint in the instant case was not breach of contract; and the claims raised are not common law claims for breach of contract. Rather, the Complaint was based upon a West Virginia statutory right created in addition to and separate from common law rights and federal rights under Section 301. Respondents brought this action against petitioner for failing *timely* to pay wages acknowledged to be due and owing.

The regulation of wages, and timely payment of those wages, is an area of traditional concern for the states, and such regulation is not pre-empted by Section 301. *DeCanas v. Bica*, 424 U.S. 351, 356, 96 S.Ct. 933, 937, 47 L.Ed.2d 43, 49 (1976); *New York Telephone Co. v. New York State Department of Labor*, 440 U.S. 519, 533, 99 S.Ct. 1328, 1337-1338, 59 L.Ed.2d 553, 564-565 (1979).

A significant body of case law regarding the survival of statutory rights and remedies holds that collectively bargained agreements do not supplant statutory rights. *See, Iowa Beefpackers v. Thompson*, 405 U.S. 228 (1972); *Leone v. Mobil Oil Corp.*, 523 F.2d 1153 (D.C. Cir. 1975) (both addressing wage and hour claims under the Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Title VII of the Civil Rights Act of 1964); *Marshall v. N.L. Industries*, 618 F.2d 1220 (7th Cir. 1980) (Occupational Safety and Health Act).

Almost directly on point is the case of *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728 (1981). In *Barrentine*, this Court held that an indi-

vidual's statutory rights under the Fair Labor Standards Act exist separate and apart from rights created by the collective bargaining agreement; and that, therefore, such statutory rights could be vindicated without resort to the contract grievance procedure or a section 301 suit.

Petitioners' reliance on the recent case of *Allis-Chalmers Corp. v. Lueck*, ___ U.S. ___, 105 S.Ct 1904 (1985) is misplaced. That case specifically states that state statutes are not pre-empted if the state statute confers non-negotiable rights independent of the rights established by contract. 105 S.Ct. at 1911-1912. See also, that portion of *Metropolitan Life* quoted extensively above, since the same argument applies in the §301 pre-emption context as in the NLRA pre-emption context.

Petitioner would have this Court believe that this case does not involve employer-union waiver of minimal state labor standards (see, Pet. 19n.13), and that the claims of respondents depend upon an interpretation of the collective bargaining agreement between petitioner and Local 772. Both of these positions are so ridiculous that they can have been interposed only in an attempt to mislead this Court. Petitioner has admitted that it and the union had a "practice" of failing to follow the time deadlines of *West Virginia Code* §21-5-4(d) in the case of lay offs. See, Pet. 4. It is clear that these time deadlines for the payment of wages owed constitute minimal state labor standards. The petitioner and the union, through the collective bargaining agreement, attempted to waive employee rights to timely payment of wages owed upon layoff. The petitioner is here asserting its right to negotiate such a waiver.

Similarly, the petitioner is using "double-speak" when it contends that respondents' claims depend upon an interpretation of the collective bargaining agreement. In fact, the collective bargaining agreement need not even be consulted. The petitioner owed wages to the respondents when it closed its doors. See, Pet. 5-6. Those wages were not timely paid as required by the West Virginia Wage Payment and Collection Act; the next regular payday after shut down having been August 7, 1980, and the wages having not been paid until on or after September 10, 1980. To determine the liquidated damages owed to each respondent under §21-5-4(e), the Court needed only to look at the wage rate paid each employee and multiply it by the days of delay.[2] To suggest that this process involves interpreting the collective bargaining agreement strains credulity.

In the instant case, the West Virginia statute confers a non-negotiable right to timely payment of wages owed. It is also important to note that the collective bargaining agreement specifically stated that state law took precedence.[3]. Also, section 21-5-10 of the *West Virginia Code* makes it clear that the provisions of

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[2]Petitioner argues that the result was harsh (see, Pet. 4n.2, 8-9), but it is clear that it was the result intended by the West Virginia legislature. See, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 351, 102 S.Ct. 3245, 81 L.ED.2d 694 (1982).

[3]Article XXVII of the collective bargaining agreement, entitled LEGAL REGULATION, provides as follows: "Nothing in this Agreement shall require either party to act in violation of any Federal or State law or regulation. In the event that any of the provisions of this agreement shall be held in violation of any Federal or State Law or regulation, as applied to this specific agreement, such determination shall not in any way affect the remaining provisions of this Agreement."

the West Virginia Wage Payment and Collection Act cannot be waived by private agreement. Under the authority of *Allis-Chalmers*, the state minimal labor standard regarding timely payment of wages which is embodied in the West Virginia Wage Payment and Collection Act, is not pre-empted by §301 of the LMRA. 105 S.Ct. at 1912. This issue has been recently decided and the teachings are clear. There is not a conflict in the circuits or among the state courts as would make a granting of certiorari appropriate.

III. THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT, 29 U.S.C. 1001, *et seq.*, DOES NOT PRE-EMPT THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT.

Petitioner further claims that the Employment Retirement Income Security Act (ERISA), 29 U.S.C. 1001, *et seq.*, pre-empts the West Virginia Wage Payment and Collection Act, in the context of this case. This claim, which was not raised until the latter stages of this litigation, would mean that no employee in West Virginia, whether unionized or not, would have any protection in a claim for unpaid vacation, break time, or casual hours pay.[4]

To make its argument, petitioner has tried to force its payroll practices of paying break time, casual hours and vacation pay out of its general assets into the mold of a "welfare benefit plan" under ERISA. See, Pet. 24. However, those payroll practices can not be forced into the mold. Although it is not dispositive of this issue that petitioner has never created a plan

---

[4]Petitioner first raised its ERISA pre-emption claim in its motion for reconsideration, served August 1, 1983, nearly three years after this action commenced.

description, or filed annual reports or other information required by ERISA; such failures are indicative of the fact that petitioner did not consider these fringe benefits to be covered by ERISA. In any case, petitioner's position is based upon a mere surface reading of ERISA.

Petitioner's claim for ERISA pre-emption of the West Virginia Wage Payment and Collection Act has its basis in 29 U.S.C. §1144(a), which states that the provisions of ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any *employee benefit plan*. . . ." (emphasis added) The emphasized portion of this statute, "employee benefit plan," is defined by reference to ERISA and the regulations implementing and interpreting the statute. Thus, if any benefit paid by an employer to an employee is *not* "an employee benefit plan" under ERISA, state law may regulate payment of that benefit.

The Department of Labor, which administers ERISA, has interpreted ERISA with respect to some common fringe benefits. The relevant portions of its regulation provides as follows:

> (b) Payroll practices. For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—
>
> * * * *
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for

> medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—
>
> (i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take take vacations at a time favorable to the employer for business reasons,
>
> . . . .

29 C.F.R. §2510.3-1(b).

The reported federal decisions, decided in 1985, have built upon the regulations and held that vacation benefits are outside ERISA's coverage. See, *California Hosp. Ass'n, et al. v. Henning*, 770 F.2d 856 (9th Cir. 1985), and *Nat. Metalcrafters, A Div. of Keystone v. McNeil*, 602 F.Supp. 232 (N.D.Ill. 1985)

In *California Hosp. Ass'n, supra*, the Ninth Circuit found that a California statute regulating the payment of vacation benefits was *not* pre-empted by ERISA, basing its decision on 29 C.F.R. §2510.3-1(b). The Ninth Circuit went on to find the regulation to be a reasonable construction of ERISA, holding it to be a controlling construction of ERISA under the doctrine of *Chevron U.S.A. Inc. v. National Resources Defense Council*, ___ U.S. ___, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

In *Nat. Metalcrafters, supra*, the District Court refused to enjoin the Illinois Department of Labor from enforcing the Illinois Wage Payment and Collection Act against an employer who had failed to pay vacation benefits, holding that ERISA did not apply to a vacation fringe benefit where there was no assets, no fund, and no trust to be protected.

In order to create confusion and an apparent conflict among the circuits, petitioner has cited to the cases of *Holland v. Burlington Industries, Inc.*, 772 F.2d 1140 (4th Cir. 1985) and *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985). However, these cases are inapposite since they concern severance pay plans. Interestingly enough, both *Holland* and *Gilbert* analyse 29 C.F.R. §2510.3-1(b) to see if severance plans should be excluded from ERISA coverage. Those courts correctly ruled that the severance plans under consideration were covered by ERISA, and that therefore state regulation was preempted.

In consequence, it appears that there is not a conflict in the circuits with respect to ERISA pre-emption. All the courts which have considered severance pay plans have found them to be covered by ERISA. See also, *Scott v. Gulf Oil Corporation*, 754 F.2d 1499 (9th Cir. 1985); *Blau v. Del Monte Corporation*, 748 F.2d 1348 (9th Cir. 1985); *Jung v. FMC Corporation*, 755 F.2d 708 (9th Cir. 1985). Similarly, all the courts which have considered vacation pay taken out of general assets have found them not covered by ERISA. There is no confusion and no conflict among the circuits and the state courts.

State courts have reached similar conclusions regarding ERISA preemption. *See, Mountain States Tel. & Tel. v. Com'r of Labor*, 608 P.2d 1047 (Mont. 1979), *appeal dismissed*, 445 U.S. 921, 100 S.Ct. 1304, 63 L.Ed.2d 754 (1980); *Minnesota Mining & Mfg. Co. v. State*, 289 N.W.2d 396 (Minn. 1979), *appeal dismissed*, 444 U.S. 1041, 100 S.Ct. 725, 62 L.Ed.2d 726 (1980); *Mass. Elec. v. Mass. Com'n Against Discrim.*, 375 N.E.2d 1192 (Mass. 1978); *Attorney General v. Trav-*

elers Ins. Co., 385 Mass. 598, 433 N.E.2d 1223 (1982), *judgment vacated*, 103 S.Ct. 3563 (1983), *aff'd*, 391 Mass. 730, 463 N.E.2d 548 (1984), *aff'd*, 105 S.Ct. 2380 (1985). Although these cases were not in the context of a Wage Payment action, their analyses are invaluable. There can be no doubt but that Judge Summerfield correctly decided that ERISA does not pre-empt the West Virginia Wage Payment and Collection Act.

CONCLUSION.

As outlined above, Judge Summerfield has rendered a correct decision on each of the issues claimed by petitioner to have been decided in error. This Court should deny the petition for a writ of certiorari in this case, so that this case can finally be put to rest and the respondents, many of whom were and are in dire straits financially, can finally receive their statutory damages for the hardship they underwent as a result of the petitioner's failure timely to pay wages owed.

Respectfully submitted,

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APPENDIX

APPENDIX A

West Virginia Code §21-5-1(c):

The term "wages" means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation. (1980 version).

West Virginia Code §21-5-10:

Except as provided in section thirteen, no provision of this article may in any way be contravened or set aside by private agreement, and the acceptance by an employee of a partial payment of wages shall not constitute a release as to the balance of his claim and any release required as a condition of such payment shall be null and void.

West Virginia Commissioner of Labor Administrative Regulation 100-23:

WAGES means all compensation, whether regular wages or fringe benefits, for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission, or other basis of calculation.

West Virginia Commissioner of Labor Administrative Regulation 305:

AGREEMENTS CONTRA TO THIS REGULATION VOID. It shall be unlawful for any employer or railroad company to enter into or make any agreement with any employee for the payment of any such employee otherwise than as provided in this Regulation, except to pay such wages at shorter intervals than herein provided. Every agreement made in violation of this regulation shall be deemed to be null and void.

Supreme Court, U.S.
FILED
MAR 5 1986
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CLERK

(3)

No. 85-1189

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

LONG-AIRDOX COMPANY, DIVISION
OF THE MARMON GROUP, INC.,
Petitioner,

v.

MELVIN KESSLER, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Circuit Court of Fayette County, West Virginia

---

SUPPLEMENTAL BRIEF FOR PETITIONER

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---

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner, the Long-Airdox Company, Division of the Marmon Group, Inc. (hereinafter "Long-Airdox" or "the Company") respectfully submits this supplemental brief in support of its petition for certiorari.

ARGUMENT

THE RECENT DECISION OF THE SEVENTH CIRCUIT IN *NATIONAL METALCRAFTERS v. McNEIL* IS IN DIRECT CONFLICT WITH THE DECISION BELOW

In its Petition for a Writ of Certiorari ("Petition"), Long-Airdox asserts that the decision of the West Virginia court merits review because it misapplied fundamental pre-emption principles established by this Court, thereby endangering collective bargaining between employers and labor organizations subject to the National

Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.* The decision also impedes uniform application of federal law regarding collective bargaining agreements derived from Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. § 185. The need for review is underscored by a recent decision of the U.S. Court of Appeals for the Seventh Circuit, *National Metalcrafters v. McNeil*, Case No. 85-1263 (7th Cir. Feb. 26, 1986), which is in direct conflict with the decision below.[1]

In *National Metalcrafters*, the Seventh Circuit rendered a decision in a case virtually identical to the instant proceeding, but reaching conclusions regarding pre-emption under the NLRA and LMRA directly contrary to those reached by the West Virginia court. This direct conflict between a federal court of appeals and the West Virginia state courts on significant pre-emption issues provides additional compelling support for granting the petition for certiorari in the instant case.

In *National Metalcrafters*, the Seventh Circuit decided whether the Illinois Wage Payment and Collection Act ("Illinois Wage Payment Act"), Ill. Rev. Stat. ch. 48 ¶¶ 38m-1 *et seq.*, can "consistently with federal law, be used to order an employer to pay vacation benefits to which its workers . . . are allegedly entitled by a collective bargaining agreement." (App. at 2a). Following the expiration of the contract and a strike, the employer had altered the vacation benefits plan in accordance with a proposal it had advanced during negotiations. The Seventh Circuit ruled that the Illinois Wage Payment Act, as applied, was pre-empted both by the LMRA and the NLRA.[2]

---

[1] Because the opinion of the Seventh Circuit is not yet reported, it is reproduced in the appendix to this supplemental brief.

[2] As in the instant case, the employer in *National Metalcrafters* also argued, in the alternative, that the Illinois Wage Payment Act was pre-empted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* The Seventh Circuit did not resolve this issue.

A. Pre-emption Under Section 301 Of The LMRA

After first noting that "virtually every state has a wage payment act of the same general sort as Illinois', and these acts seem rich in potential for conflict with the federal labor and employee financial security laws" (App. at 2a),[3] the Seventh Circuit proceeded to describe why the Illinois Wage Payment Act, as applied, was pre-empted.

The court noted that "Section 301 of the [LMRA] creates a federal remedy for the breach of a collective bargaining agreement" and that this "remedy is exclusive; no action to enforce an agreement may be based on state law" (App. at 8a). The administrator of the Illinois Wage Payment Act, McNeil, contended that the employer had violated the statute by refusing to pay vacation benefits in accordance with the expired collective bargaining agreement between the employer and its employees' union. The Seventh Circuit unhesitatingly concluded that Section 301 pre-empted the state statute despite McNeil's effort to place the dispute outside the scope of Section 301 by arguing that the case involved statutory, not contractual rights, and that, in any event, there was no contract dispute because the contract was "unequivocal" (App. at 8a). The court pointed out that the employees' statutory rights were predicated on their contract rights and that there was at the very least "an arguable contract dispute" because there was "a gap in the language of the contract" (App. at 10a). Section 301 therefore pre-empted any state causes of action because "[i]f there is an arguable contract dispute . . . the power to resolve it is confined to . . . proceedings" under Section 301 (App. at 10a).

---

[3] Another recent decision, by the U.S. Court of Appeals for the Fourth Circuit, confirms the accuracy of this observation. Although decided on a jurisdictional issue, the underlying dispute concerned a conflict between the South Carolina wage claim statute and the LMRA. *Cook v. Georgetown Steel Corp.*, 770 F.2d 1272 (4th Cir. 1985).

Significantly, the West Virginia court justified its conclusions by reasoning virtually indistinguishable from that squarely rejected by the Seventh Circuit. Thus, the court stated the West Virginia Wage Payment and Collection Act ("West Virginia Wage Payment Act"), W. Va. Code §§ 21-5-1 *et seq.*, was not pre-empted because it "intended to create rights for individual employees and not for a bargaining unit as such" (App. E to Petition at 17a). The Seventh Circuit found this purported distinction between statutory and contractual rights to be illusory. The West Virginia court also attempted to discount the significance of any contractual issues by stating that "[t]he only disagreement was the amount to be paid [*i.e.*,] the dispute was over whether payment should be made under provisions of the recently expired contract or the contract negotiated almost contemporaneously with the decision to close the plant" (App. E to Petition at 17a). Clearly, from the West Virginia court's own description of the dispute in the instant case, there was much more of a contract dispute here than the "arguable" dispute the Seventh Circuit found sufficient for pre-emption by Section 301.[4] Finally, in the most obvious conflict with the decision of the Seventh Circuit, the West Virginia court concluded that even though respondents "probably" did "have a remedy under section 301 of the LMRA", this was not their "exclusive remedy [and did not] preempt[] available state remedies" (App. E to Petition at 18a).

---

[4] In their Brief in Opposition to Petition for a Writ of Certiorari ("Brief in Opposition"), respondents go beyond the lower court and refuse to acknowledge that there was any contractual dispute. But of course there was: respondents' bargaining representative insisted that the employees had only been laid off and were entitled to have their fringe benefits paid out at the rate applicable in December, 1980 under the new contract, whereas Long-Airdox's position was that the employees were terminated and should have their fringe benefits paid out immediately, at the wage rates in effect under the old contract.

Two other observations of the Seventh Circuit are especially significant and stand in sharp contrast both to the decision below and to the contentions advanced in respondents' Brief in Opposition. First, the Seventh Circuit emphasized that the Illinois Wage Act was not, as applied, a minimum state labor standard immune from pre-emption. *Cf. Metropolitan Life Insurance Co. v. Massachusetts*, —— U.S. ——, 105 S. Ct. 2380 (1985). The Seventh Circuit pointed out that the statute had not "created an entitlement that was independent of the collective bargaining contract" (App. at 10a). In the instant case, of course, Long-Airdox's obligation to pay the benefits to its former employees was entirely derived from the collective bargaining agreements. Nothing in West Virginia law requires employees to be paid "break time" or "casual day" benefits. Nonetheless, the West Virginia court thought that the statute imposed "an absolute duty" to pay the benefits on the date specified, despite any agreement to the contrary (App. D to Petition at 12a).

Second, the Seventh Circuit emphasized that this Court's recent decision in *Allis-Chalmers v. Lueck*, —— U.S. ——, 105 S. Ct. 1904 (1985), removed any doubt that the Illinois Wage Payment Act was pre-empted. *Allis-Chalmers* establishes that Section 301 governs suits asserting entitlement to contractually-derived benefits even when the plaintiffs claim to be vindicating non-contractual rights and/or insist that their reading of the contract is clear and "incontestable" (App. at 12a). *Cf.* Brief in Opposition at 13-15 (argument that *Allis-Chalmers* is distinguishable because respondents are vindicating non-contractual rights and there is no need to interpret the contract). As the Seventh Circuit put it, *Allis-Chalmers* provides "decisive support for finding pre-emption under Section 301" (App. at 13a).

B. Pre-emption Under The NLRA

The Seventh Circuit also found that the Illinois Wage Payment Act, as applied, was pre-empted by the NLRA since it attempted to regulate bargaining between the

employer and its employees' union. The Seventh Circuit stated that the statute "in effect authorizes a state official to inject himself into the bargaining process" (App. at 18a). Even more so, the West Virginia Wage Payment Act, as applied, was pre-empted by the NLRA because it represented not just an attempt to regulate collective bargaining over the payment of benefits, but was interpreted to preclude collective bargaining over the payment of benefits. Indeed, the West Virginia court specifically held that Long-Airdox could not "justify its failure to pay wages [*i.e.*, the fringe benefits] within the time prescribed by statute" because it was engaged in bargaining with respondents' Union (App. D to Petition at 12a).

In *National Metalcrafters*, the employer allegedly unlawfully altered its vacation benefits plan after the contract expired and the employees went out on strike. Such action arguably violated the NLRA, in part because the employer may have been "trying to place financial pressure on the strikers to return to work by giving them less vacation pay than they had earned" (App. at 16a). However, as the Seventh Circuit pointed out, such allegations merely buttressed the argument for NLRA preemption since conduct arguably forbidden by the NLRA "may not be regulated under state law" (App. at 14a).

Thus, the remark by the West Virginia court that Long-Airdox's conduct "may have violated both the NLRA and applicable West Virginia Code provisions" (App. E. to Petition at 17a) is anomalous since, if anything, this argues for NLRA pre-emption. So too, respondents' vehement accusation that Long-Airdox willfully withheld the benefits because it "determined to play hardball . . . in order to secure a favorable shut down agreement," Brief in Opposition at 6, actually undercuts respondents' position that the statute was not pre-empted since, if true, Long-Airdox arguably violated the NLRA.[5]

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[5] Respondents' accusations are, it should be noted, unsupported by the record. As the uncontradicted affidavits submitted by the

However, the record in this proceeding reveals that the case for pre-emption here is even more compelling than it was in *National Metalcrafters*. The West Virginia Wage Payment Act, as applied by the lower court, directly interfered with the employees' right to bargain collectively and the Company's correlative duty to bargain exclusively with its employees' designated representative. Respondents' Union urged the Company to pay the benefits at the higher wage rate that would be applicable in December, 1980; according to the West Virginia court, such negotiations over the time of payment were prohibited. Thus, this case does not involve conduct that was only arguably prohibited or protected, but rather conduct "actually protected by federal law" and, therefore, "pre-emption follows . . . as a matter of substantive right." *Brown v. Hotel & Restaurant Employees*, —— U.S. ——, 104 S. Ct. 3179, 3187 (1984).[6]

Similarly, the Seventh Circuit's distinguishing of *Metropolitan Life*, *supra*, in the context of NLRA pre-emption applies with even more force to the instant case. The Seventh Circuit found *Metropolitan Life* inapposite because the Illinois Wage Payment Act does not "set certain minimum terms of employment" but has only "created a new remedy for violations of collective bargaining agreements" (App. at 17a). In the instant case, the provision of the West Virginia Wage Payment Act at issue has likewise provided no substantive benefit since the specification of a certain date for payment of wholly

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Company to the lower court establish, the Company did not pay the benefits because it concluded that there was a conflict in its obligations under state and federal law. It decided to comply with federal law. Respondents never submitted any counter-affidavits.

[6] Respondents erroneously state that Long-Airdox maintains their cause of action is pre-empted by the NLRA because the conduct at issue was "arguably" protected or prohibited. Brief in Opposition at 8. The bargaining between respondents' Union and Long-Airdox and Long-Airdox's conduct were actually protected and mandated by the NLRA.

contractual benefits can hardly be characterized as itself a substantive benefit. But Long-Airdox's case is even stronger. In the instant case, the allegedly unlawful delay in the payment of the benefits was, or so the respondents' Union maintained, to the employees' advantage, as the benefits would then be calculated at a higher wage rate. A state statutory provision which precludes the parties to a contract from bargaining for increased benefits simply cannot be characterized as a "minimum state labor standard."

Finally, much the same can be said of the Seventh Circuit's rejection of the contention that the Illinois Wage Payment Act was not pre-empted because it " 'touches interests deeply rooted in local feeling and responsibility' " (App. at 17a; quoting *Belknap v. Hale*, 463 U.S. 491, 498 (1983)). This echoes the contention of the West Virginia court (App. E to Petition at 15a) and of respondents, Brief in Opposition at 13, that the regulation of wage and benefit payments is a "traditional concern" of state governments and therefore not pre-empted by the NLRA. The Seventh Circuit correctly observed that this contention is without merit because "[t]he potential for interference with the system of collective bargaining is too great to allow us to place this case within the 'local feeling and responsibility' exception" to NLRA pre-emption (App. at 18a).

Moreover, in a case such as the instant one, in which there was actual, and not just potential, interference with federally-protected collective bargaining, "local feeling and responsibility" is not even a factor. Where "the issue is one of an asserted substantive conflict with a federal enactment, then '[t]he relative importance to the state of its own law is not material . . . for the Framers of our Constitution provided that the federal law must prevail.' " *Brown v. Hotel & Restaurant Employees*, 104 S. Ct. at 3187 (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

Both Section 301 of the LMRA and the NLRA "express[] a strongly held policy in favor of applying uniform federal principles" to labor controversies (App. at 13a). The West Virginia court not only refused to honor this policy, but, by imposing substantial penalties on Long-Airdox, also effectively held that employers which decide to comply with federal law do so at their own peril. This elevation of state wage payment laws over conflicting federal laws, especially in light of the contrary decision of the Seventh Circuit, should be reviewed by this Court.[7]

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinions of the Fayette County Circuit Court.

Respectfully submitted,

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DATED: March 5, 1986

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[7] The substantial penalties imposed on Long-Airdox, which even the lower court conceded were "punitive" and "very harsh" (App. A to Petition at 3a), make the conflict between the West Virginia Wage Payment Act and federal labor law "all the more obvious", since "[p]unitive sanctions are inconsistent . . . with the remedial philosophy of the NLRA." *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*, —— U.S. ——, 54 U.S.L.W. 4228, 4229 n.5 (U.S. Feb. 26, 1986).

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-1263

NATIONAL METALCRAFTERS, a division of KEYSTONE CONSOLIDATED INDUSTRIES,
Plaintiff, Counterdefendant-Appellant,

vs.

DONALD J. MCNEIL, Superintendent, Wage Claims Division, Illinois Department of Labor,
Defendant-Appellee,
and

BETTY JOHNSON, on behalf of herself and all others similarly situated,
Intervenor-Defendants, Counterplaintiffs-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 2190—George N. Leighton, *Judge.*

ARGUED DECEMBER 2, 1985—DECIDED FEBRUARY 26, 1986

Before BAUER and POSNER, *Circuit Judges,* and GRANT, *Senior District Judge.**

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* Hon. Robert A. Grant, of the Northern District of Indiana, sitting by designation.

POSNER, *Circuit Judge.* National Metalcrafters sues for a declaration that the Illinois Wage Payment and Collection Act, Ill. Rev. Stat. ch. 48, ¶¶ 39m-1 *et seq.*, cannot, consistently with federal law, be used to order an employer to pay vacation benefits to which its workers (many of whom are on strike) are allegedly entitled by a collective bargaining agreement. The federal laws alleged to preempt the wage payment act are the Employees Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001 *et seq.*, the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, and section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. Although virtually every state has a wage payment act of the same general sort as Illinois', and these acts seem rich in potential for conflict with the federal labor and employee financial security laws, few reported cases deal with these acts and none controls the issues in this case.

McNeil, the administrator of the Illinois act, ruled that National Metalcrafters had to pay its workers $115,000. Rather than pay, National Metalcrafters brought this suit. The workers intervened as parties defendant and counterclaimed under section 301 of the Taft-Hartley Act—claiming that the company's refusal to pay the vacation benefits violated the collective bargaining contract between their union and the company—and alternatively under ERISA, claiming that by failing to pay them the company had violated fiduciary duties imposed by that statute. The district judge held that the Illinois act was not preempted and entered judgment dismissing the company's suit. 602 F. Supp. 232 (N.D. Ill. 1985). The judge certified his judgment for an immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure, and National Metalcrafters has appealed.

The pendency in the district court of a counterclaim based on the same facts as the claim which the court dismissed would ordinarily preclude an immediate appeal; a judgment disposing of one of several claims is

sufficiently final to be appealable imediately under Rule 54(b) only if the claims do not have a significant factual overlap. See, *e.g.*, *Exchange Nat'l Bank v. Daniels*, 763 F.2d 286, 291, reheard in part, 768 F.2d 140 (7th Cir. 1985); *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 702 (7th Cir. 1984). If they do overlap, it is more economical that they be appealed together. National Metalcrafters argues that its dispute with the workers over vacation benefits cannot give rise to liability under the wage payment act because that act is preempted by federal laws; the counterclaim asserts that the dispute gives rise to liability under two of those laws. Thus the legal theories underlying the complaint and counterclaim are different but arise out of the same dispute, the same facts; and two claims are not separate for purposes of Rule 54(b) merely because one is in the complaint and the other in the countercomplaint. See *Tenneco Inc. v. Saxony Bar & Tube, Inc.*, 776 F.2d 1375, 1378-79 (7th Cir. 1985). It is true that the complaint raises an issue of law (federal preemption) rather than of fact, but it is an issue whose intelligent disposition requires familiarity with the parties' dispute and hence with the very issues that will come before this court if and when a final decision on the counterclaim is appealed. In effect the company's suit seeks to erect at the threshold a defense to a suit against it by McNeil; and an order dismissing a defense is not an order that Rule 54(b) allows an immediate appeal from.

But there is a separate and adequate ground for the use of Rule 54(b) in this case. An order that disposes finally of a claim against one party to the suit can be certified for an immediate appeal under the rule even if identical claims remain pending between the remaining parties. *Walker v. Maccabees Mutual Life Ins. Co.*, 753 F.2d 599, 601 (7th Cir. 1985); *Banque Paribas v. Hamilton Industries Int'l, Inc.*, 767 F.2d 380, 383 (7th Cir. 1985). The judge's order in this case disposes, with

finality in the district court, of the company's claim against McNeil. He is not a party to the counterclaim. He is out of the case, and the company is entitled to a definitive resolution of its rights against him. This entitlement may benefit McNeil, though that is not a prerequisite to the appeal. He doesn't have to wait till the end of what may be protracted proceedings in the district court to find out for sure whether he is, as the district court found, not violating any rights of the plaintiff.

Another threshold issue is whether the district court should have abstained from deciding the company's case against McNeil under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), which forbids a federal court to enjoin a state criminal or quasi-criminal proceeding and certain other types of state enforcement proceeding. See also *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *W.C.M. Window Co. v. Bernardi*, 730 F.2d 486, 490 (7th Cir. 1984). An unresolved question is whether a court can ever order abstention under the *Younger* doctrine when, as in this case (as, indeed, in *Younger* itself), the state has not asked for it. See discussion in *Sequoia Books, Inc. v. McDonald*, 725 F.2d 1091, 1094-95 (7th Cir. 1984). We need not decide the question in this case, since in any event we do not think the doctrine is applicable.

The ruling by Superintendent McNeil which precipitated the company's lawsuit is a statement of intentions rather than a coercive order. His opinion says, "A demand for payment will issue, and the Department will take appropriate legal action to enforce said demand, absent voluntary compliance by the Employer." The wage payment act authorizes the state's Department of Labor "to make complaint in any court of competent jurisdiction of violations of this Act." Ill. Rev. Stat. ch. 48, ¶ 39m-11(c). But no such complaint has yet been filed. We may assume without having to decide that if such a complaint had been filed, *Younger* would have required

the district court to stay further proceedings in the present suit, thus forcing National Metalcrafters to make its argument for preemption by way of defense in the state court suit. The tentativeness of "assume without having to decide" is due to uncertainties about the precise range of civil actions to which the doctrine of *Younger* applies, see *W.C.M. Window Co. v. Bernardi, supra*, 730 F.2d at 490, and would disappear of course if a criminal action to enforce the wage payment act had been brought against National Metalcrafters; the act provides for criminal sanctions. See Ill. Rev. Stat. ch. 48, ¶ 39m-14. It would not matter whether the criminal action was brought before the federal case or after, provided that substantial proceedings had not yet taken place in the federal case. The application of the Younger doctrine does not depend on who gets to which courthouse first. *Hicks v. Miranda*, 422 U.S. 332, 348-49 (1975).

But with no state proceeding having been brought, National Metalcrafters has no remedy in state court against the alleged unconstitutional application of the wage payment act (alleged to be unconstitutional under the supremacy clause because in conflict with valid federal law). This clears out *Younger* as an obstacle to maintaining this suit but creates another obstacle—the possibility that the suit is unripe. If you violate a state law and nothing is done about it, this may indicate that the law is not being enforced and that you have no practical interest therefore in getting the law enjoined. But that is not this case. The state in a formal proceeding has authoritatively declared National Metalcrafters to be in violation of the statute, and while the state seems content to abide the results of National Metalcrafters' suit before bringing a criminal or other enforcement suit against the company, the workers who are the beneficiaries of the statute have by their counterclaim in the present suit demonstrated the practical consequences of Superintendent McNeil's ruling; for al-

though the counterclaim is based on federal law rather than the wage payment act, the workers have cited McNeil's ruling in support of their interpretation of the collective bargaining agreement. The considerations that led us to dismiss as unripe an attempt to enjoin threatened state enforcement proceedings in *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 252-53 (7th Cir. 1981), are thus absent. See also *Illinois v. General Elec. Co.*, 683 F.2d 206, 210-11 (7th Cir. 1982).

Coming to the merits of the appeal, we face first a question of judicial tactics: whether to consider all three of National Metalcrafters' grounds for preemption of the wage payment act or fewer than all three, as we can do if we find at least one to be valid. It might seem that one ground would always be enough, that to go on and discuss others would just dilute the force of our decision—there would be no holding, just alternative holdings. And a dubious holding bracketed as it were by sound holdings might cause mischief in the law, became the Supreme Court rarely grants review to decide an issue that is irrelevant to the outcome of the case. See Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 S. Ct. Rev. 345, 372-73. The other side of the coin, however, is that piecemeal consideration of the grounds for appeal may result in successive remands that greatly prolong the litigation; an example from criminal law is discussed in *Reimnitz v. State's Attorney*, 761 F.2d 405 (7th Cir. 1985). Moreover, there is a benefit to resolving legal questions that are squarely presented, fully ripe, and fully argued: their resolution provides guidance to the community, and reduces legal uncertainty.

The issue we are most reluctant to decide is whether the Illinois wage payment act is preempted by ERISA. It is a difficult issue and if resolved in favor of preemption would have far-reaching consequences. It would apply not merely to companies that have collective bargain-

ing contracts but to all companies, even those without pension plans. It would subject all companies with vacation plans to the elaborate requirements that ERISA imposes on plans within its scope, would broadly displace the regulation of vacation benefits by state law, and could bring a host of trivial cases into the federal courts. We do not have to reach the issue of preemption under ERISA because, as we are about to see, the application of Illinois' wage payment act to this particular dispute is preempted by both the National Labor Relations Act and section 301 of the Taft-Hartley Act; and we shall not reach it, or drop the slightest hint about its correct resolution.

The issue of preemption by the federal labor statutes is focused by considering the particulars of the company's dispute with the union. A collective bargaining contract that expired on April 16, 1983, provided that "an eligible employee who has attained the length of service indicated below as of July 1, 1980, or any subsequent year during the term of this Agreement, shall receive a vacation corresponding to such length of service with vacation pay as shown in the following table . . . ." For example, a worker with 20 or more years of service would be entitled to four weeks of vacation and 9 percent "of the employee's straight-time earnings for the year period prior to May 1 of the vacation year." The contract also provided that "an employee who is terminated on or after January 1 but prior to July 1 of any year during the term of this Agreement shall receive a vacation payment at time of termination, or as soon thereafter as practicable," pro rated from the table. When the contract expired, the union called a strike. In July, with the strike still in progress, the company paid its workers, including those who were out on strike, vacation pay for the year ending May 1, 1983, computed however on a basis generally though not invariably less favorable to the workers than the table in the expired

contract. A worker with 20 years service was entitled to only three weeks of vacation, and 6.5 percent of his previous year's earnings (compared to four weeks and 9 percent under the expired contract); but a worker with only 3 years service did better under the new scheme than the old. The changes in vacation arrangements that the company thus unilaterally adopted were the same as it had proposed in unsuccessful negotiations with the union for a new contract to replace the one that had expired in April. Hundreds of employees complained to the Illinois Department of Labor, precipitating McNeil's ruling, which concluded that the company had violated the contract.

Section 301 of the Taft-Hartley Act creates a federal remedy for the breach of a collective bargaining agreement. The remedy is exclusive; no action to enforce such an agreement may be based on state law. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957); *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342, 345 (7th Cir. 1985). McNeil argues that section 301 is no bar to his enforcing the state's wage payment act against National Metalcrafters, and this for two reasons: that the wage payment act does not grant a remedy for breach of contract, but punishes conduct in the nature of conversion or fraud; and that he did not interpret the contract but merely applied an unequivocal term in it. Although the act is not entirely clear in this regard, McNeil interprets it as limited to cases where the employer's refusal to pay wages or benefits amounts to willful nonpayment of money due for past work and therefore already earned. If the employee's obligation is unclear or debatable the act is inapplicable—which, McNeil argues, prevents a collision with section 301.

But a determination that a contract is so clear as to make a breach willful (setting to one side the question of a breach that, while knowing, is not willful, because it is involuntary—e.g., the company just has run out of

money) *is* an interpretation of the contract, as the facts of this case make clear. The contract expired before July 1, which was when vacation pay became due under its terms for the work year that had ended on May 1. The issue before McNeil was the effect of expiration. The company conceded that the workers were entitled to some vacation pay but argued that the proper rate of pay was that in effect on July 1—the generally less generous rate that the company had adopted after the collective bargaining contract had expired. McNeil, noting that any worker who had been terminated between January 1 and April 16 would have been entitled to vacation pay pro rated according to the table in the contract, while if the company were right a worker who had continued to work after that would be entitled to vacation pay at a different (and generally lower) rate, thought that "no reasonable person . . . could have read the 1980 Contract and expected such an illogical outcome, in which one earns more by failing to complete the vacation year."

This is an overstatement. If the company had adopted a vacation plan more favorable to the workers than the plan in the old contract, as for a variety of reasons it might have done (the new plan *was* more favorable, to younger workers), the interpretation for which the company was contending would not result in so "illogical" an outcome. More important, McNeil was reading into the contract an implicit provision vesting the vacation pay rights granted in the contract as of the date when a worker complied with the preconditions laid down in the contract, even if that date followed the expiration of the contract. Remember that the contract made the rate of vacation pay depend on one's earnings in the year ending May 1, which fell after the contract had expired. Nevertheless under McNeil's view any worker still on the payroll on July 1 was entitled to vacation pay on the terms in the collective bargaining contract, even though the contract had expired not only before July 1 but before May

1, when the work year ended. The contract contains no provision regarding the vesting of rights in its last year; McNeil plugged the gap.

His interpretation of the contract may have been correct, an issue we do not want to prejudge. But it was an interpretation. The company was not violating what any fool would know was an express obligation of the contract. It was exploiting a gap in the language of the contract. A court or arbitrator might fill the gap just as McNeil did, by interpreting the silence of the contract as pregnant in light of other provisions; the arbitrator's decision that we upheld in *Ethyl Corp v. United Steelworkers*, 768 F.2d 180 (7th Cir. 1985), a factually analogous case, was such an interpretation; but it can be made only in a proceeding under section 301. If there is an arguable contract dispute, and there is here, the power to resolve it is confined to such proceedings.

In the usual case in which section 301 is alleged to preempt state law, the state law claim is not a contract claim but a tort claim, and the issue is whether nonetheless "resolution of [the] state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract." *Allis-Chalmers Corp. v. Lueck*, 105 S. Ct. 1904, 1916 (1985). See also our recent decision in *Gibson v. A T & T Technologies, Inc.*, No. 85-1815 (7th Cir. Jan. 27, 1986). The only basis of the state-law claim in this case is that the company broke its contract to grant vacation pay of a certain amount. No state law required that any vacation pay be given or fixed the rate of such pay if given. This is not a case like *Metropolitan Life Ins. Co. v. Massachusetts*, 105 S. Ct. 2380 (1985), where state law required employers who bought health insurance for their employees to insist on certain terms in the policies. The state law created an entitlement that was independent of the collective bargaining contract. No issue of contract interpretation could have arisen, and preemption by vir-

tue of section 301 was not even argued. The only thing the state law at issue in this case requires is that the employer honor his contract. To decide whether he has done so requires interpreting the contract, unless, perhaps, the particular contractual provision is so clear as to preclude all possible dispute over its meaning, but it is not.

This case is not like *Whelan's Inc. v. Kansas Dept. of Human Resources*, 235 Kan. 425, 681 P.2d 621 (1984), where the state's wage payment act required as in this case that vacation benefits be paid at the wage rates in force when the benefits were earned but there was no dispute over when they had been earned. Again no argument of preemption based on section 301 was made, since there was no dispute over the meaning of the parties' contract.

Although *Carpenters Health & Welfare Fund v. Kenneth R. Ambrose, Inc.*, 727 F.2d 279, 282 n. 5 (3d Cir. 1983), rejected contentions that Pennsylvania's wage payment act was preempted by either by ERISA or the Taft-Hartley Act, the court's entire discussion of the issue consists of the statement, "we find that these contentions are without merit." The particulars of the contentions and the grounds of the court's action are inscrutable

These cases, moreover, are placed under a shadow by the Supreme Court's recent decision in *Lueck*. A worker sued his employer and the insurance company that administered the provisions of the collective bargaining agreement relating to disability benefits, charging a refusal, in bad faith, to honor his claim for benefits. Although the tort of refusing in bad faith to honor an insurance claim requires "a breach of contract which is not even 'fairly debatable,'" 105 S. Ct. at 1915 n. 13, this was not enough to avoid the preemption of the tort by section 301. One might have thought that if the breach was indeed not fairly debatable, there could be no possible conflict between state and federal principles for interpreting contracts. The Court in *Lueck* disagreed,

perhaps because one person's incontestable contract reading is another's fairly debatable one. The present case is a much stronger one for preemption, as the question whether the employer broke the contract is "fairly debatable."

McNeil argues that National Metalcrafters has waived its argument based on section 301 by failing to make it in the district court. National Metalcrafters did argue that the wage payment act was preempted by federal labor law, but the only specific law it mentioned was the National Labor Relations Act; and an issue is not properly reserved by perfunctory invocation of a vast and variegated body of law—by pointing to Title 29 of the United States Code and inviting the district judge to thumb through it for some ground on which the party extending the invitation can win. We have refused to consider a ground for reversal that the appellant had raised but that had been "presented in so perfunctory and underdeveloped a manner in his brief that we shall not consider it." *Hershinow v. Bonamarte*, 735 F.2d 264, 266 (7th Cir. 1984); see also *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983). A district judge is likewise entitled to disregard a ground raised but not pressed.

But like almost every other principle of law, that which adjures courts not to reverse on grounds (other than grounds going to the court's subject-matter jurisdiction) not pressed below has its exceptions. See, e.g., *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *Marrese v. Interqual, Inc.*, 748 F.2d 373, 384 (7th Cir. 1984); *Capitol Indemnity Corp. v. Keller*, 717 F.2d 324, 329 (7th Cir. 1983); *New York, N.H. & H.R. Co. v. Reconstruction Finance Corp.*, 180 F.2d 241, 244 (2d Cir. 1950) (L. Hand, J.). Even those of us who are most emphatic in our opposition to reversing decisions on the basis of grounds not properly preserved by the appellant recognize that our opposition must yield "in exceptional circumstances," *Tom v. Heckler*, 779 F.2d 1250, 1259 (7th Cir. 1985) (dissent-

ing opinion), as where the ground is based on strongly held policies demarcating the spheres of competence of state and federal government. *Younger v. Harris, supra,* which involved interference by a federal district court with an essential state function, that of prosecuting criminal offenders, was such a case, and the Supreme Court reversed although the appellant had not asked for reversal on that ground. See 401 U.S. at 40; *Schlesinger v. Councilman,* 420 U.S. 738, 743 (1975). Section 301 expresses a strongly held policy in favor of applying uniform federal principles to the interpretation of collective bargaining contracts. This policy reflects the national commitment to limiting state regulation of labor relations that grows out of the history of hostility in some states to the labor movement.

Of course there is a difference between a court's staying its hand and a court's reaching out to forbid another branch of government from acting; so we do not suggest that the case for overlooking the appellant's failure properly to preserve one of its grounds for appeal is the same here as in *Younger.* There are, however, other features of this case which mitigate the gravity of the appellant's oversight. The issue of preemption by section 301 has been fully briefed and argued on appeal. It does not require for its resolution any factual determinations, so there is no question of the company's having derived some advantage from bypassing the district court or of our being placed at a disadvantage in reviewing the issue by the absence of a determination on it in that court. As we are about to see, the issue is logically as well as factually intertwined with the issue that National Metalcrafters did raise of preemption by the National Labor Relations Act. *Lueck,* which provides in our view decisive support for finding preemption under section 301 in this case, came down after the district court's decision in this case, and the timing provides at least a partial excuse for National Metalcrafters' failure to press the section 301 issue in that court. Finally, National Metalcrafters did raise

the issue in the district court, if inadequately; and since it was complaining that McNeil had improperly as well as incorrectly interpreted the collective bargaining agreement, using principles of state rather than federal law, the existence of an issue of preemption under section 301 fairly shouted from the facts. Cf. *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1112 n. 11 (5th Cir. 1985); *Rebaldo v. Cuomo*, 749 F.2d 133, 137 (2d Cir. 1984); *Texas v. United States*, 730 F.2d 339, 358 n. 35 (5th Cir. 1984). Considering the circumstances, we cannot see what there is to be gained from refusing to decide the issue.

We could stop here, having found that McNeil's ruling is made unenforceable by section 301 of the Taft-Hartley Act; but the other ground for preemption, that based on the National Labor Relations Act and raised and decided in the district court, is so closely related to the section 301 ground that we shall press on. A company's repudiation of a term in its collective bargaining agreement is likely to raise questions under both section 301 and the NLRA; and just as section 301 is exclusive in its sphere, so conduct that may be within the scope of the NLRA, which is to say conduct that the National Labor Relations Board might hold either to be forbidden by the Act or privileged by the Act, may not be regulated under state law. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor & Human Relations*, 750 F.2d 608, 610 (7th Cir. 1984), prob. juris. noted, 105 S. Ct. 2356 (1985). Passed against a background of unhappy experience with state regulation of labor relations, and embodying a delicate balance between the rights of employers and of unions, the Act has been interpreted to forbid the states to attempt to regulate labor relations in the industries subject to it.

The union originally thought that the company's action in unilaterally implementing its altered vacation pay plan indeed violated the National Labor Relations Act, for it

filed a complaint (later withdrawn) with the Labor Board. Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), forbids employers to interfere with union activities; and here the altered plan was put into effect during a strike. Section 8(a)(5), 29 U.S.C. § 158(a)(5), forbids the employer to refuse to bargain in good faith with a union representing its employees; and one form that such a refusal can take is for the employer to change the terms or conditions of employment unilaterally, before having bargained to a deadlock ("impasse," in the accepted jargon). If it has bargained to a deadlock it can make such changes, provided that they are within the scope of its proposals during the bargaining period, see, e.g., *Western Newspaper Publishing Co.*, 269 N.L.R.B. 355 (1984), and cases cited there, and are not motivated by hostility to the union, which would bring section 8(a)(1) into play. See generally *Carpenter Sprinkler Corp. v. NLRB*, 605 F.2d 60, 64-65 (2d Cir. 1979).

When the contract in this case expired, the union called a strike, and the company then put the new vacation arrangements into effect. If, as the company argues, it was effectuating the very proposal which it had made to the union and about which it had bargained to an impasse, its conduct was protected. See, e.g., *Western Newspaper Publishing Co., supra*, 269 N.L.R.B. at 356-57; *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 472 (3d Cir. 1983). "Impasse" signifies that the parties have been unable to come to terms, after honestly trying to do so. If before this happens the company unilaterally changes the terms or conditions of work, it is bypassing the bargaining process, and therefore is not bargaining in good faith. And if after an apparent impasse the company puts into effect a change that it had not laid on the bargaining table, this implies that the company had held something back from the negotiations, so again it could not have been bargaining in good faith. See the lucid discussion of these matters in *NLRB v. Katz*, 369 U.S. 736 (1962). It may seem that if, as McNeil found, the company was depriv-

ing its employees of vested rights created by a collective bargaining contract, it could not have been implementing the company's collective bargaining proposal, because that was a proposal for changing the next collective bargaining agreement. But all that this would prove, if it were true, was that the company really had violated the National Labor Relations Act, in which event state regulation would be preempted. And it might not be true. A union might decide to surrender some vested rights of its members if, for example, that was necessary in order to keep the company from shutting down a plant and throwing all the workers out of work; so a proposal for such a "give back" is not necessarily inconsistent with serious bargaining.

Another possibility is that the company was trying to send the striking workers a message that the strike was futile, since at best it could lead to a new collective bargaining contract and the company had just shown that the last contract was just a scrap of paper. This would violate both sections 8(a)(1) and 8(a)(5), as it would undermine both the union and the bargaining process. See *Robins Door & Sash Co.*, 260 N.L.R.B. 659, 662 (1982); *Stokely-Van Camp, Inc.*, 259 N.L.R.B. 961 (1982), rev'd, 722 F.2d 1324 (7th Cir. 1983). (We reversed *Stokely-Van Camp* because we found that the Labor Board's order was not supported by substantial evidence; the principle was not disturbed.). This would be especially clear if the company was trying to place financial pressure on the strikers to return to work by giving them less vacation pay than they had earned. The strikers may have been counting on that pay to tide them over the period of the strike. It may not be an accident that the new vacation plan benefits younger at the expense of older workers; the latter tend to be stronger union adherents. The company may have been playing divide and conquer.

Against all this McNeil argues that the wage payment act, like a minimum wage or maximum hours law, does

no more than set certain minimum terms of employment; and the enforcement of those terms, being required by state law, simply is outside the regulatory domain of the Labor Board. The National Labor Relations Act sets the ground rules for economic warfare; but if a state withdraws a part of the employment relationship from that warfare, by requiring a mandatory term in every employment contract, as in the *Metropolitan Life* case discussed earlier, that part is no longer within the Board's purview.

The problem with this argument is that the wage payment act does not require any terms in the employment contract. It just requires the employer to stick to the terms it has negotiated with the employee or the employee's bargaining representative. It is precisely because vacation time and vacation pay are negotiable that the company, by (arguably) flouting the vacation provision of the old contract, can send a signal to the workers that it is no use authorizing a union to negotiate with it. The state has simply created a new remedy for violations of collective bargaining agreements. Nor is the statute a public benefits program that happens to benefit labor over management, such as the statute in *New York Tel. Co. v. New York State Dept. of Labor*, 440 U.S. 59 (1979), which entitled striking workers to unemployment benefits. When applied as in this case to a disputed term of a collective bargaining contract whose expiration precipitated a strike, the wage payment act injects state officials into labor disputes over which the National Labor Relations Board has exclusive jurisdiction.

McNeil also appeals to a line of cases in which state regulation of conduct within the scope of the National Labor Relations Act has been held not to be preempted because the regulation "touches interests deeply rooted in local feeling and responsibility." *Belknap v. Hale*, 463 U.S. 491, 498 (1983). If an employer hires goons to beat up picketers, this violates the Act, but it also is a

common law battery, and the state is not forbidden to provide the usual tort remedy for it. The enforcement of laws of general applicability that may happen to be violated during strikes as during other disputes is unlikely to disrupt the Labor Board's regulation of labor relations. The wage payment act, however, as applied in this case (an important qualification, of which more shortly), in effect authorizes a state official to inject himself into the bargaining process and threaten the company with a fine for making a unilateral change in the terms of employment in violation of an expired collective bargaining agreement. The potential for interference with the system of collective bargaining is too great to allow us to place this case within the "local feeling and responsibility" exception.

Thus the application of Illinois' wage payment act to this dispute over vacation pay is doubly preempted: by section 301 of the Taft-Hartley Act and by section 8 of the National Labor Relations Act. This conclusion does not leave employees who are in the position of the intervenors in this case, or for that matter these intervenors, without remedy. If an employer violates a collective bargaining contract, there is a remedy under section 301 (if he does not violate it, there is not—but the whole premise of McNeil's action is that the company violated the contract); and the counterclaim, which remains pending in the district court, seeks it. If the employer commits an unfair labor practice, there is a public remedy under the National Labor Relations Act; the remedies under that Act and under section 301 are not mutually exclusive. There just is no state remedy.

Do not exaggerate the scope of our holding. We are not striking down the wage payment act. The act can continue to be applied in employment settings—the majority—where there is no collective bargaining contract and no labor dispute within the purview of the National Labor Relations Board. And even if there is a contract,

if its meaning is so clear that the company cannot in good faith dispute the workers' vested rights to benefits under it, the state will not be prevented from enforcing the wage payment act by section 301 of the Taft Hartley Act, as interpreted in this opinion (*Lueck* may go further); and unless the dispute arises as it did in this case out of the collective bargaining negotiations, not by the National Labor Relations Act either. Even if it does arise out of such negotiations, if the refusal to honor the contract is in such patent bad faith as to partake of the wrongfulness associated with some of the traditional common law intentional torts, conceivably the application of the wage payment act would not be preempted though this is not an issue we need decide in this case.

The judgment is reversed with directions to enter judgment for National Metalcrafters on its complaint against McNeil.

A true copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit